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A MANUAL FOR THE ADMINISTRATOR OF THE MONTANA SUBDIVISION AND PLATTING ACT
Second Edition

Revised by:

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for

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INTRODUCTION

A Manual for the Administrator of the Montana Subdivision and Platting Act (Manual) was first published in 1986 to provide a detailed explanation of the requirements under state statute and local regulations for conducting local government subdivision review and approval. This 1994 edition of the Manual updates the explanations to reflect legislative changes to the Montana Subdivision and Platting Act (MSPA) since 1986. The 1993 Legislative passed a number of significant changes to the MSPA. The 20-acre definition of "subdivision" was increased to 160 acres; the occasional sale exemption was deleted, and the use of the family conveyance exemption was restricted to a "one-time only" transfer of land to each member of the immediate family; and the eight public interest criteria were changed to five primary review criteria.

This 1994 Manual complements the 1993 Model Subdivision Regulations (Model), published by the Department of Commerce to serve as an example and reference for local governments to use in preparing or revising their own regulations.

The Manual is aimed primarily at the person charged with carrying out the local government's responsibilities under the Montana Subdivision and Platting Act (MSPA) and the local subdivision regulations. The Manual not only describes the legal requirements placed on Montana municipalities and counties, it also recommends actions or methods local officials can use to ensure the effectiveness of local subdivision review.

The Manual focuses is on administering the MSPA and local subdivision regulations. However, because approval of the sanitation facilities under the Montana Sanitation in Subdivisions Act (MSIS) is vital to public health and is related to local subdivision review, the operation of the MSIS is given considerable attention. In administering the MSPA, local officials will find it advantageous to coordinate with the Department of Health and Environmental Sciences. Therefore, the local subdivision administrator and sanitarian need to work closely on land divisions.

A major part of the Manual deals with the procedures for reviewing and approving a subdivision. It treats the overall process in three phases and provides a detailed explanation on how to handle certain key aspects of the review process. Part III provides a detailed examination of certificates of survey and land divisions exempt from subdivision review. The Manual tries to clarify the complexities of the exemptions and recommend means by which local officials may clarify legitimate use of the exemptions and minimize abuse.

The Manual explains the responsibilities of the county clerk and recorder, planning board and governing body. The Appendices provide very comprehensive and detailed explanations of various aspects of administering subdivision regulations, sample forms, and checklists.

The Manual brings together local experience from across Montana during the 20 years the MSPA has been implemented. The publication describes many of the past successes that might work for a community, and it warns of pitfalls that should be avoided.
To assist the reader, many parts of the Manual cite references to state law, court cases, Attorney General Opinions, and the Model. The Manual tries to clearly distinguish the legal requirements from the recommendations.

In the Manual the term "subdivision administrator" is used to mean any person charged with enforcing and administering subdivision review for a local government. Typically, staff planners have that responsibility, but in local jurisdictions with no planning staff, a city or county clerk, sanitation, planning board member or elected official might carry out those duties.

As a result of the 1993 legislative changes to the MSPA, a greater percentage of land divisions very likely will be subject to local government review and approval. In place of the previous widespread use of the occasional sale and 20-acre exceptions to review, local government probably will see submittal of a greater number of minor subdivisions, especially those containing one or two lots. These small subdivisions usually will not create the impacts and concerns of larger subdivisions, and the Community Technical Assistance Program (CTAP) urges local governments to adopt procedures that allow more expeditious review of these "low impact" subdivisions.

This 1994 Manual discusses provisions to deal with the amended criteria for reviewing and approving subdivisions. Appendix I provides suggested statements for compiling a written Findings of Fact required under the MSPA.

In many areas in Montana, suitable and affordable housing is in short supply. The CTAP revised the Model Subdivision Regulations with consideration for reducing barriers to affordable housing, while safeguarding public health and safety in the development of housing. This Manual discusses these revisions that include suggestions for expeditious review of minor subdivisions, and for simplified and less restrictive road standards.

In addition to the Model Subdivision Regulations and this Manual, the CTAP has recently published a series of publications to assist local governing officials and staff and the private citizens. These publications include:

- Montana's Subdivision and Surveying Laws and Regulations
- A Primer: Subdivision Review Under the Montana Subdivision And Platting Act
- A Guide to the Exemptions of the Montana Subdivision and Platting Act
- A Key to the Filing Requirements of the Montana Subdivision and Platting Act

If you have any questions about the 1993 Model Subdivision Regulations, A Manual For The Administrator Of The Montana Subdivision And Platting Act or other Department publications, please contact the Department of Commerce, Community Technical Assistance Program, 1424 Ninth Avenue, Helena, Montana 59620, phone (406) 444-3757.

AFFORDABLE HOUSING

In many areas of Montana the shortage of affordable housing is becoming severe. Out-of-state in-migrants, attracted to Montana's amenities and willing and able to pay high prices for housing, are making an unprecedented impact on the cost and availability of housing stock. Increasingly, low and moderate income families are unable to afford safe and decent housing. Although land use regulations seldom are significant barriers to affordable housing in Montana, every community should examine its subdivision and other regulations to ensure that sufficient land in suitable locations is available at reasonable cost.

This publication, A Manual for the Administrator of the Montana Subdivision and Platting Act, explains procedures and standards intended to protect the public interest, promote pleasant, convenient and functional neighborhoods, and encourage the provision of affordable housing.

Review Process

This Manual encourages local jurisdictions to include a preapplication conference as part of the local review process. The preapplication conference can save a developer time, money and frustration by assuring a clear understanding of the procedures and application requirements, and the design standards that must be met. By knowing from the beginning what information will be needed, and that excessive design features can be avoided, the subdivider often can save time and money.

The suggested procedures would allow the preliminary plat application for a major subdivision to be reviewed and action taken within approximately 50 days (compared to the maximum legal review period of 60 days). The Model Subdivision Regulations suggests procedures that would allow governing body action on minor subdivisions within approximately 25 days, and action on "low impact" subdivisions within 15-20 days (compared to the maximum legal review period of 35 days).

This Manual contains an extensive set of appendices that contain sample forms and documents. These samples will save a subdivider a significant amount of time and exasperation in submitting the required documents that are necessary to submit proper preliminary and final subdivision plats.

"Low Impact" Subdivisions

Qualifying one and two lot subdivisions can be addressed under expeditious provisions. The Model suggests a brief review process involving 15-20 days. Reduced application requirements are suggested that will reduce time and costs for the applicant. The Model also offers reduced road standards that local officials might consider for "low impact" subdivisions.

One and two lot subdivisions likely will replace the creations of parcels by the occasional sale exemption and 20-acre tracts. Although raw land sells less expensively than improved lots, ultimately constructing all-season roads, functioning water and sewer systems and storm drainage facilities are realistic and necessary costs to make an unimproved parcel into a livable home site. Public review of subdivisions, even small ones, not only ensures that proper building sites are provided, they reveal from the beginning the true costs of a creating a buildable lot. Low and moderate income lot buyers are less apt to be caught unaware of real costs later, and they will benefit by the fact that requirements have been met to obtain good title to the property.

Legislative changes enacted in 1993 that deleted the 20-acre exception, probably will promote affordable housing by fostering the creation of smaller lots with proper improvements that will offer a supply of affordable building sites for low and moderate income people. Many lot buyers do not want large 20-acre lots, which were mostly created prior to 1993 to avoid subdivision review. Promoting development with higher densities , where appropriate, often reduces housing costs.

Design Standards

The Model tries to make the design standards as specific as possible to remove uncertainty about the requirements. For those approval criteria that are imprecise, the appendix offers suggested language or examples to help clarify application of the criteria.

Land cost is one significant element of the cost of housing. Suggested standards for road rights-of-way and road widths are minimums that prevent unnecessary consumption of land. The design standards have been developed so that cluster development can be readily designed. By reducing road rights-of-way to 50 feet on level terrain a minimum of cutting and filling usually is needed. Swales are recognized as an adequate means of removing storm water, and curbs and gutters are not mandated. "T" turnarounds are recognized as a land-saving alternative to cul-de-sacs.

Part I – Basic Concepts of Subdivision Review

PART I BACKGROUND AND BASIC CONCEPTS

A. NEED AND BENEFIT OF SUBDIVISION REGULATIONS

1. Historical View

The subdivision of land for urban development is a natural aspect of modern industrial societies. In the United States, state and local governments adopted subdivision control laws in response to the harmful consequences of the premature subdivision of land that occurred in the late 1800's and early 1900's. During that period in American history a boom in land speculation resulted in the splitting of large tracts of agricultural and forest lands into small urban parcels.

While some profited from the land boom, many others found themselves living on parcels in partially completed developments and without fully developed basic services. Many tracts were not needed for residential or other types of development, and many owners forfeited the properties to the government.

Prior to the mid-twenties, subdivisions were created primarily to facilitate land transactions. Speculation was an integral part of that early American land tradition. There was little regulation, and land was plentiful and could be purchased, divided and developed at low cost.

Extensive land speculation fostered premature subdivision of land, tied up large amounts of capital for unproductive periods of time, increased property taxes and special assessments, and raised utility costs and maintenance costs. Unsafe and poor quality housing developments also were a consequence of haphazard growth. Lots were created that were not served by useable roads or by proper water and sewer systems. Often lots were created in unsuitable locations, such as in areas that regularly flooded. Correcting improperly designed subdivisions often proved to be difficult or impossible.

Historically, subdivision regulations developed as a means of responding to these problems. Subdivision regulations were drafted to give local government officials some control over the way land was platted and converted into building sites.

The U.S. Department of Commerce published the Standard City Planning Enabling Act in 1926. The Act initiated the concept of subdivision regulations serving as a legal means for a municipality to influence orderly land development, rather than subdivision functioning chiefly as a land sales device.

Nationally, subdivision regulations have evolved through several phases. From the early 1900's when subdivision control laws were concerned with platting and recording, state and local governments began using subdivision regulations to ensure quality development and to shift the cost of improvements to the developer. After World War II local

governments shifted their emphasis to adopting regulations that required dedication of open space, recreational areas or school sites as part of developments. Since the 1970's subdivision regulations have also served to mitigate the impacts of growth on community services and the natural environment.

Montana enacted its first enabling law for subdivision control by cities and counties in 1883. That act, Plats of Cities and Towns, gave local governments control over surveying and platting of townsites and subdivisions.

In response to statewide concern over unregulated land divisions, the 1973 Legislative session passed The Montana Subdivision and Platting Act (MSPA), which gave local governments more comprehensive control over surveying, platting and subdivision design than did the earlier statute. The MSPA requires that local governments adopt and enforce local subdivision regulations. The 1973 statute defined a "subdivision" as the division of land into parcels less than 20 acres in size, a condominium, or a tract that provides multiple spaces for mobile homes or recreational vehicles. The MSPA allowed a number of exemptions from subdivision review, and as a result approximately 90 percent of the land subdivided over the following 20 years escaped local review.

In 1975, legislative amendments to the statute incorporated a requirement that local governments must find that a proposed subdivision would be in the public interest before approving the plat. To determine whether a subdivision would be in the public interest, the local governments were required to weigh eight criteria: the basis or need, expressed public opinion, and the effects of agriculture, local services, taxation, wildlife and wildlife habitat, public health and safety and natural environment.

In 1993, 20 years after the initial MSPA was enacted, the Legislature made significant changes to the law. The 20-acre definition was changed to 160 acres; the most commonly used exemption, "occasional sale," was eliminated; the "family conveyance exemption was restricted to a one-time transfer to each family member in each county; the subdivision must provide easements for needed utilities, and must provide legal and physical access; and the eight public interest criteria were changed to five primary review criteria.

To assure safe septic systems and adequate water supplies, the Legislature passed the Montana Sanitation in Subdivisions Act in 1961. In 1973 the law was changed to require that newly created parcels of less than 20 acres, with several exemptions, be reviewed and approved by the Department of Health and Environmental Sciences for proper water, sewer, drainage and solid waste facilities plans prior to filing the plat or survey with the county clerk and recorder.

2. Need and Benefit

People must have a place to live and work. Providing those places results in the essential activity of land subdivision and development. The manner in which land originally is

divided can determine, with positive or negative results, the future development pattern of a community. Once large tracts of land are broken down into individual parcels, the pattern of development is irretrievably set. Thus, land developers take actions that greatly affect communities, homeowners, taxpayers, the governing body and the general public.

Although each community is unique, similar opportunities and problems are encountered wherever land is divided. Local officials are learning that land developments that are properly regulated can substantially benefit the community. Much of the form and character of a community is determined by the character of subdivisions and the standards to which they are built.

When cities or counties cannot, or do not, exert proper control over the division of land, the result can be low quality or substandard developments, excessive or premature development of land, or partial or inadequate development. Many of the most frustrating community problems today are the result of haphazard development.

The single most important justification for subdivision regulation is the safety and welfare of the community. The community has a legitimate interest in any new subdivision. The original layout determines the character of the area or community for an indefinite period of time. The manner in which the subdivision is designed and built directly affects the safety and health of the residents and the community at large.

Many local officials believe that subdivision regulations are the most effective land use tool available and are most useful in achieving land use goals. Subdivision regulations influence the first step of land use change, the creation of new parcels. The unpopularity of zoning in Montana minimizes its effectiveness in attaining sound land development.

Local road and public works departments have found that subdivision regulations directly benefit their operations and budget. Properly designed and constructed streets are easier and cheaper to maintain and repair.

Careful review of street layout can prevent excessively long cul-de-sac streets, dead end streets, and steep grades that often delay fire and ambulance vehicles providing emergency services. In addition, police and sheriff departments point out that traffic hazards can be reduced with sound design of street intersections, and by avoiding confusion among street names.

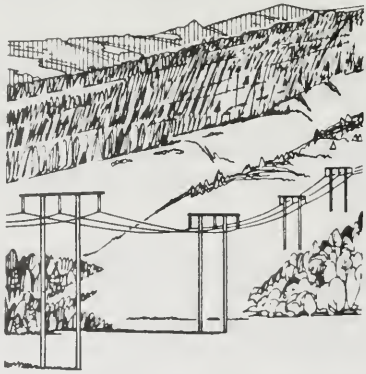
School districts benefit when development layouts allow school buses to operate efficiently. Proper subdivision design allows safe walking routes between homes and schools.

Subdivision regulations help assure that water and sewer systems have mains and fittings that meet the standards of the municipality and are compatible with existing systems.

Private firms involved with real estate financing and title transactions can benefit from subdivision regulations. Banks and other lending institutions know that properly planned and reviewed land developments are sound investments and better risks for loans than haphazard developments. Also, mortgage insurers, such as the Federal Housing Administration and the Veterans Administration, often require their own standards for land developments, and their concerns are usually met by local subdivision regulations. In addition, the order brought to the land records system by the subdivision approval process will be a definite advantage to title insurance companies and others involved in title transactions.

AN IMPROPERLY INSTALLED CULVERT. Subdivision review can help ensure that public facilities are properly designed and constructed. Review of public facilities also can minimize long term maintenance and repair costs by requiring proper installation.

Private utilities (power, gas, telephone) benefit from subdivision review because it allows the firms to know that legal easements, proper location of routes, and sensible lot layout will allow ready installation and maintenance of utility facilities.



Developers also benefit. A properly designed subdivision is more marketable and usually brings a higher sale price. Buyers are willing to pay more for lands that provide attractive, well planned building sites, all season access, park and recreation areas, and orderly road systems.

Ultimately, the local taxpayer is a real beneficiary of subdivision regulations. In unreviewed developments, poorly designed roads and other facilities often must be repaired or rebuilt for safety or health reasons. Usually, improperly designed or constructed facilities cost the taxpayer not only through repair or reconstructions, but also through increased maintenance demands.

3. Benefits In Montana

In Montana subdivision regulations are the most effective land use regulatory tool. In fact, subdivision regulations are the primary local development regulatory device in the state. Subdivision regulations are mandatory, while other land use regulations, such as zoning, are optional for Montana local governments.

We have very little zoning outside of municipalities, primarily because of political opposition. Rural citizens simply have not accepted county zoning. In addition, the state's county zoning enabling statute makes adoption of zoning regulations in the unincorporated area difficult because it allows a 40 percent freeholder protest to prevent adoption of a zoning proposal.

The Montana Subdivision and Platting Act goes beyond the traditional subdivision regulation enabling acts. It requires that subdivision review and approval be based not only on sound design, but also on criteria that allow consideration of location, type (density), fiscal impact (revenues vs. costs of services), effects on agriculture, wildlife and natural resources.

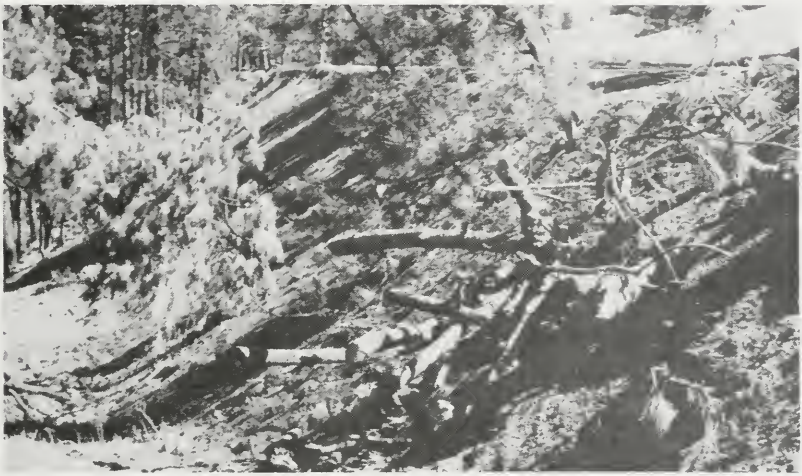
Also, the MSPA requires local officials to consider whether proposed subdivisions comply with an adopted comprehensive plan in subdivision approval.

Therefore, in Montana effective enforcement of carefully drafted subdivision regulations can provide an even greater benefit than in other states.

DEVELOPMENT IN FLOOD HAZARD AREA. Floodwaters breached a levee and inundated this mobile home site located in the floodplain.

UNSUITABLE BRIDGE. This bridge provides access to a residential subdivision. Not only is the structure unsafe for even moderate traffic, it represents potential liability problems, and will create inconvenience and future costs for replacement when it collapses.

ACCESS ROAD. This road serves a residential development that was not subject to subdivision approval. The road is unsurfaced, has an excessive grade and is causing sloughing of the side slope.



UNSTABLE FILL. Decaying limbs and other unstable materials will accelerate the deterioration of this rural residential road.

B. MONTANA LEGAL FRAMEWORK FOR SUBDIVISION REGULATION

1. General

The legal authority for regulation of land subdivision is complex. Two separate statutes are involved, each with supplementary administrative rules. By law, each of the 56 counties and 127 municipalities enforce their own local subdivision regulations. In addition, the legal framework has been affected by state Supreme Court decisions, district court decisions, state Attorney General Opinions, and city and county attorney opinions.

Two statutes directly govern land subdivisions and the development of mobile home courts and condominiums: the Montana Subdivision and Platting Act (MSPA) and the Montana Sanitation in Subdivisions Act (MSIS). The MSPA requires local governments to regulate the layout and design of land subdivisions, mobile home parks, recreation vehicle parks, and condominiums, the construction of improvements within subdivisions, and the surveying and filing of plats and certificates of survey.

The MSIS requires that the Montana Department of Health and Environmental Sciences (or in some cases qualified local health departments) review and approve plans for the provision of water, sewage disposal, solid waste disposal and drainage facilities related to subdivisions.

2. Montana Subdivision and Platting Act, 1973

The Montana Subdivision and Platting Act (76-3-101 *et seq.*, MCA) delegates control over subdivisions to counties and municipal governments. The state has given local governments the power to adopt subdivision regulations and regulate the design of subdivisions and prohibit subdivisions in areas unsuitable because of health or safety hazards such as flooding, polluted water, high ground water, or unstable soils or geology.

The MSPA requires all municipalities and counties to adopt and enforce local subdivision regulations, and it sets out a list of considerations that those local regulations must address. The act defines as "subdivisions" those land divisions that create parcels less than 160 acres, mobile home parks, recreation vehicle parks and condominiums. Local government must evaluate developments qualifying as subdivisions under the definition and determine whether to approve, conditionally approve or disapprove the proposed development.

The MSPA requires that the local approval be based on a written findings of fact that weighs the following criteria:

a. Effect on agriculture, local services, the natural environment, wildlife and wildlife habitat, and the public health and safety;

b. Compliance with the requirements of the MSPA and the regulations and review procedures of the local subdivision regulations;

c. The provision of easements for the location and installation of any needed utilities; and

d. The provision of legal and physical access to each parcel within the subdivision and the notation of that access on the applicable plat and any instrument transferring the parcels.

To aid local officials in reviewing proposed subdivisions the MSPA requires developers of subdivisions with six or more lots to prepare an environmental assessment that is intended to provide facts and information regarding the site and impacts on the community.

Under the MSPA, subdividers must meet a park and playground requirement -- 1/9 of the combined area of those lots less than 5 acres, and 1/12 of the combined area of those lots between 5 and 10 acres. The park requirement can be met, at the discretion of the governing body, through a dedication of land to the public, a donation of cash-in-lieu of land, or a permanent reservation of land to a property owners' association.

The MSPA promotes procedural due process* by setting out public notice and hearing requirements. Except in the case of "minor subdivisions" (subdivisions with five or fewer lots where no park land will be dedicated to the public) a formal public hearing must be held during the preliminary plat approval process. A notice of the hearing must be published in a local newspaper at least 15 days before the hearing, and property owners and holders of contracts for deed to lands adjoining the proposed subdivision must be notified of the hearing by certified mail.

When a hearing is held by a planning board, the board must make its recommendation to the governing body within 10 days following the hearing.

Minor subdivisions qualifying for summary review are not subject to the public hearing requirement. However, local governments can comply with constitutional due process requirements and Montana's Open Meeting Law by publishing notice and considering the minor subdivision at a regular meeting, which is open to the public.

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* Property owners have certain constitutional rights that may not be abridged by land use regulations. The U.S. Supreme Court and lower federal courts have established standards of procedure that land use regulations must incorporate to protect property rights.

Substantive due process is assurance, primarily for the developer, that land use requirements: are reasonable; implement local government goals; relate to public health, safety and general welfare; and will not result in a "taking" of property by rendering it without economic value. Montana law places responsibility for substantive due process primarily on local units of government as they adopt local subdivision regulations. The Montana Department of Commerce has published a MODEL SUBDIVISION REGULATIONS that suggest not only procedural provisions but also design standards and other substantive provisions to serve as a guide to local units of government.

The MSPA requires the Department of Commerce to adopt administrative rules governing surveying and monumentation and the preparation and filing of final subdivision plats and certificates of survey. Those administrative rules have been adopted as "Uniform Standards of Monumentation" (ARM 8.94.3001), "Uniform Standards for Certificates of Survey" (ARM 8.94.3002), and "Uniform Standards for Final Subdivision Plats" (ARM 8.94.3003).

3. Montana Sanitation in Subdivisions Act, 1961

The Montana Sanitation in Subdivisions Act (76-4-101, *et seq.*, MCA) was first passed in 1961. The impetus for enacting the act originally was to prevent contamination of drinking water by septic systems and cesspools. Its purpose has become broadened over the years to include protecting the public health through the review and approval of proposed water, sewer, solid waste, and drainage in all subdivisions and most land divisions that are exempt from local government review. Condominiums, mobile home and recreational vehicle parks also are subject to sanitation review under MSIS.

Generally, the Montana Department of Health and Environmental Sciences (DHES) approves the sanitation facilities in subdivisions and other land divisions. In 1985 the Legislature amended the MSIS to allow local health agencies that have qualified personnel to accept authority for sanitation approval over certain land divisions. Those include divisions that will create five or fewer parcels with on-site water and sewage disposal facilities and divisions proposed to connect to municipal systems where no extension of the system is needed.

The types of developments subject to sanitation review under the MSIS parallel those required to be reviewed under the MSPA with one major addition. Parcels that are exempt from local government review under MSPA through use of exemptions such as the "family transfer" still are subject to sanitation approval under the MSIS (see table in this chapter). Not only are parcels created through such exemptions subject to DHES review, but any remaining parcels of less than 20 acres that result from use of the exemptions must receive sanitation approval under MSIS.

All final subdivision plats and certificates of survey showing parcels created by certain exemptions such as the "family transfer" also must have a certification sanitation approval

before they may be filed in the Clerk and Recorder's office. In addition, mobile home and recreation vehicle parks and subdivisions created by rent or lease must receive sanitation approval even though no final subdivision plat or certificate of survey is filed.

The DHES has adopted administrative rules under authority of the MSIS. Those rules, "Subdivision Regulations," (ARM 16.16.101 through 16.16.805) govern DHES approval of sanitation facilities.

4. Legal Opinions Affecting The MSPA And MSIS

Many Montana Supreme Court and district court cases and Attorney General opinions have shaped the interpretation and enforcement of the MSPA and the MSIS. The MSPA alone currently is affected by more than 75 separate binding legal rulings. In addition, city and county attorney opinions affect the administration of subdivision regulations by the individual local jurisdictions.

Local officials are bound by Supreme Court decisions and by Attorney General Opinions unless those opinions are overruled by Supreme Court decisions. District court decisions, on the other hand, are binding only on the parties involved but do provide useful guidance to other local governments in administering the subdivision laws.

A high percentage of the legal opinions issued by the Attorney General and courts have focused on the use of the exemptions and whether particular uses of the exemptions are "...adopted for the purpose of evading ..." the MSPA.

Attorney General opinions (37 Op. Atty Gen. 41, 1977; and 40 Op. Atty Gen. 16, 1983) have held that units of local government are empowered to determine the circumstances under which use of the exemptions constitutes an attempt to evade the purpose of the MSPA. In the 1983 opinion the Attorney General held that, because local governments are empowered to determine when the use of exemptions constitute an attempt to evade the Act, local officials can require a landowner to present evidence that he is entitled to the exemption (40 Op. Atty Gen. 16).

Other key Supreme Court cases affecting the MSPA include a 1975 ruling that certificates of survey are exempt from review by the planning board, and that no fee for reviewing certificates of survey may be charged by the county (*Swart v. Stucky*, 167 Mont. 164, 1975).

In 1978 the Court held in *Florence-Carlton School District v. Board of County Commissioners* (180 Mont. 285) that the requirement for a public interest determination based on the eight public interest criteria also apply to minor subdivisions (since 1993 a finding that a subdivision must be in the public interest is not required). Also, the Court ruled in 1980 (*Bd of Trustees v. Bd of County Commissioners*, 37 St. Rptr 175) that where a governing body reviews and approves a subdivision in violation of the Montana's open meeting law, the approval is invalid.

The Montana Supreme Court issued a ruling in 1964 that was considered a national precedent. In *Billings Properties v. Yellowstone County* (144 Mont. 25) the Court upheld a state law requiring park dedication as a condition of subdivision approval. The Court reasoned that residents of the subdivision create a need for park facilities and therefore requiring dedication of parkland to meet the needs of the subdivision is valid. The ruling was made in response to a challenge of a park dedication provision of the previous subdivision law, Plats of Cities and Towns (11-602, R.C.M., 1947), which served as the basis for the current park provision in the MSPA (Section 76-3-606, MCA)

The Attorney General has issued many opinions regarding the MSPA in response to requests for opinions. In one key opinion he defined "immediate family" to mean the spouse of the landowner and the children or parents of the landowner by blood or adoption (informal opinion in letter to Alan Jocelyn, Nov. 8, 1979).

In 1980 the Attorney General held that deeds and contracts for deeds that convey land in violation of the MSPA are voidable. Violations of the MSPA may be corrected by the parties of the transaction by voiding the prior improper conveyance and conveying the land in accord with the MSPA (38 Op. Atty Gen. 106).

[See Appendix C for a comprehensive outline of court cases and Attorney General opinions affecting the MSPA].

C. PLATS VS. CERTIFICATES OF SURVEY; SUBDIVISIONS VS. EXEMPTED DIVISIONS

Under the MSPA, land divisions fall into either the category of subdivisions, or into one of three categories that do not require local government subdivision review.

First category (subdivisions): those land divisions that require subdivision review and approval by the governing body, and filing of a subdivision plat with the county clerk and recorder before title to lots can be transferred.

Second category (divisions exempt from local approval but requiring a survey): land divisions that are exempt from local government review and approval as subdivisions, but which must be surveyed and a certificate of survey filed (without local subdivision approval) before title can be transferred.

Third category (divisions exempt from local review and surveying): land divisions that can be made without a survey and without local subdivision approval.

Fourth category (minor redesign of platted subdivisions): land divisions creating five or fewer lots or minor redesign within platted subdivisions that do not need local government approval, but need to be surveyed and the survey filed as an amended subdivision plat.

Whenever local government approval is required, the division of land is a subdivision, and the survey, if required, must be filed as a final subdivision plat.

Generally, surveys of land divisions that do not need local government approval as subdivisions may be filed as certificates of survey. Certificates of survey, while not needing governing body approval, must meet drafting standards and filing requirements specified in administrative rules adopted by the Montana Department of Commerce as Uniform Standards for Certificates of Survey (ARM 8.94.3002).

1. First Category (Subdivisions)

In the first category, land divisions that create parcels less than 160 acres in size must be reviewed and approved as subdivisions by the governing body, and the surveys must be filed as subdivision plats. This category also includes amendments to existing subdivision plats (except divisions in the fourth category), as well as plats dividing unplatted land.

Parcels of less than 160 acres created by rent or lease, rather than by sale, must have local subdivision approval, but no survey or final plat is necessary.

2. Second Category (Divisions exempt from local subdivision review but requiring a survey.

This category includes parcels that are exempt from local subdivision review but require a survey.

First, any parcel 160 acres or larger in size is not subject to local subdivision review. Parcels 160 acres or larger that cannot be described as consisting of 1/32 or larger aliquot parts must be surveyed, although they are exempt from subdivision review.

Second, parcels less than 160 acres in size that are exempt from subdivision review under the exemptions for a family transfer [76-3-207 (1) (b), MCA], agricultural purpose [76-3-207 (1) (c), MCA], or relocation of a common boundary line [76-3-207 (1) (e), MCA] but cannot be described as a 1/32 or larger aliquot part (76-3-401, MCA) must be surveyed.

All parcels in this category must be surveyed by a registered land surveyor and a certificate of survey filed with the county clerk and recorder before the title can be transferred.

DIAGRAM: ALIQUOT PARTS OF A SECTION

This diagram shows Section 11 divided into 4 quarter sections. Quarter sections are called 1/4 aliquot parts, meaning 4 equal parts. The highlighted quarter section is called the northwest quarter of Section 11, written as NW 1/4 of Section 11.

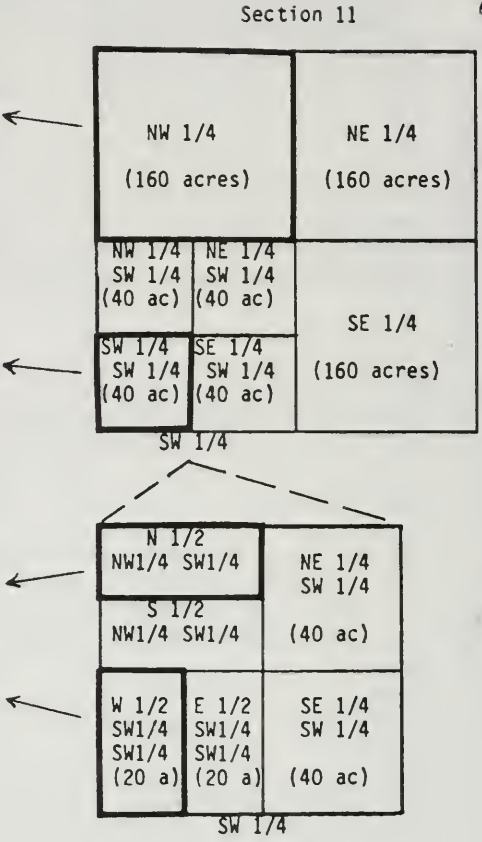
The southwest quarter (SW 1/4) is further divided into 4 quarter quarter sections (or 1/16 aliquot parts of a section).

The highlighted quarter-quarter 1/4 section is called the southwest quarter of the southwest quarter (SW 1/4 SW 1/4 of Section 11).

This insert shows the SW 1/4 of Section 11 divided into 4 quarter-quarter sections. The NW 1/4 SW 1/4 has been divided into halves.

This tract is the north half of the northwest quarter of the southwest quarter, written N 1/2 NW 1/4 SW 1/4 of Section 11.

This tract is the west half of the southwest quarter of the southwest quarter, or W 1/2 SW 1/4, SW 1/4 of Section 11.
Each of these highlighted tracts is a 1/32 aliquot part of a section.



3. Third Category (Divisions exempt from subdivision review and surveying)

This category includes divisions of land that do not require subdivision approval or surveying.

First, parcels 160 acres or larger that can be described as consisting or a combination of 1/32 or larger aliquot parts do not require surveying. As an example, a parcel 180 acres in size does not require subdivision review. If that parcel can be described, for example, by reference to a 1/4 aliquot part (160 acres) and an adjacent 1/32 aliquot part (20 acres), the parcel does not need to be surveyed.

Second, parcels less than 160 acres in size that are exempt from subdivision review under the exemptions for a family transfer, agricultural purpose, or relocation of a common boundary line, and can be described as consisting of 1/32 or larger aliquot parts, do not require subdivision approval or surveying.

Third, divisions of land of any size need not be reviewed or surveyed [76-3-201, MCA] if they:

- Are created by a court order or operation of law;
- May be created through eminent domain;
- Provide securities for construction loans or mortgages;
- Separate interest in oil, gas, minerals or water from surface ownership;
- Create cemetery lots;
- Create a reservation of a life estate; or
- Create parcels for lease as farming or agricultural land.

None of the parcels in this category need to be surveyed or reviewed as subdivisions in order to transfer title.

4. Fourth Category (Minor Redesign of Platted Subdivisions)

The divisions in the fourth category are somewhat unusual in that they are made as amendments to a platted subdivision, but do not need governing body approval. Within a platted subdivision five or fewer lots may be redesigned (through boundary relocations) or aggregated without approval by the governing body. The divisions must be surveyed and an amended plat filed. Rather than the usual signature of the governing body, a statement of this exemption must appear on the face of the amended plat.

D. RELATIONSHIP OF SUBDIVISION REGULATIONS TO OTHER LAND USE POLICIES AND REGULATIONS

1. Montana Sanitation In Subdivisions Act (MSIS)

The MSPA and the MSIS operate under similar definitions of what constitutes a "subdivision" with two significant exceptions. First, the MSPA allows a number of exemptions from review that are not exempted under MSIS – the family transfer and a relocation of a common boundary line.

Second, under MSPA only parcels created for sale, rent, or lease are subject to review, whereas under MSIS all parcels less than 20 acres in size resulting from the division must be reviewed. A parcel remaining after lots or parcels have been created for transfer by a subdivision or certificate of survey are not subject to local subdivision review under the MSPA if the remaining parcel has not been created for the purpose of transfer (Attorney General Letter Opinion to Robert McCarthy, Esq., April 22, 1987). Under the MSIS those

remainder parcels clearly are subject to DHES review whether or not they are intended for conveyance.

Thus, MSIS has a much more comprehensive authority than the MSPA to bring a greater range of parcels under review. The MSIS and administrative rules adopted by DHES specify the situations that are exempt from sanitation review, but generally those parcels of less than 20 acres that will not have water or sewer facilities are exempt.

Divisions of land subject to local subdivision review under MSPA are filed as subdivision plats. Divisions exempt from subdivision review are filed as certificates of survey, except where parcels exempt from local subdivision review under the family transfer, relocation of common boundary line, or agricultural exemptions can be described as a 1/32 or larger aliquot part of a government section or as a government lot. Surveys of divisions of land for relocation of boundary lines or aggregation of five or fewer lots in a platted subdivision are filed as amended plats. Thus under MSIS the DHES and local sanitarians or health officials review and approve sanitation facilities for parcels shown both on subdivision plats and certificates of survey.

REQUIRED REVIEW FOR VARIOUS TYPES OF LAND DIVISIONS

Subdivision Review Required For:	MSPA	MSIS
Land subdivisions, sale or lease	Yes	Yes
Mobile home, recreation vehicle parks	Yes	Yes
Condominiums	Yes	Yes*
Subdivisions in master planned areas or Class 1 and 2 municipalities with no w/s extension	Yes	No
Relocation of common boundary, building requiring water or sewer	No	Yes
Redesign, aggregation of 5 or fewer platted lots (no MSIS review if connected to public water and sewer)	No	Yes
Family transfer	No	Yes
Parcels larger than 20 acres & less than 160	Yes	No
Court orders; operation of law	No	No
Laws of Eminent Domain (condemnation)	No	No
Security for construction mortgage, lien	No	No
Sever interest in oil, gas minerals, water	No	No
Cemetery lots	No	No
Reservation of life estate	No	No
Rent or lease for agricultural purpose	No	No
Sale for agricultural purpose with covenant	No	No
Land acquired for state highway	No	No

* Condominium buildings proposed on lots approved for condominiums are exempt under both MSPA and MSIS.

2. The Comprehensive Plan

Subdivision review is only one of the normal functions of local planning boards. Subdivision regulations work most effectively when used to implement the land use goals and objectives of a local government, usually set forth in a comprehensive plan. As a matter of fact, provisions in both the MSPA and the Planning Enabling Act (76-1-101 *et seq.*, MCA) recognize the importance of regulating subdivisions in the context of longer range land use planning.

In the absence of a comprehensive plan, subdivision regulations are more effective in influencing the internal design and function of a proposed subdivision, than in regulating the location or type of development.

Weighing and evaluating the 5 primary criteria is easier if the local government has adopted a sound comprehensive plan, because the physical and ecological limitations of the land and resources are known, and social, economic and fiscal effects of development can be readily identified. Local government, in addressing such considerations, must evaluate the location of the subdivision and its characteristics in addition to its internal features.

Subdivision regulations should not be considered a substitute for sound, thoughtful planning. Subdivision regulations are a means through which local officials react to a subdivision proposal. A comprehensive plan often sets forth policies and guidelines in advance that help shape the growth pattern of the community and improve the future development.

Where a local jurisdiction has adopted a comprehensive plan, the staff planner, planning board and governing body should consult the plan when reviewing each new subdivision proposal. Consulting the plan should help assure that the subdivision will be coordinated with other development and local government plans for roads, parks, recreation facilities, water and sewer system, solid waste disposal, weed control, and other public services in the area.

Even if the local government does not use the comprehensive plan as a basis for approving or disapproving a subdivision, the plan will help all local officials better understand how the subdivision would affect their operations and provision of service, and allows them to develop better plans, budgets and overall increased effectiveness in serving local citizens.

The comprehensive plan can be used to direct development towards areas within the local jurisdiction that are most suitable for growth and development, because of natural features or efficient provision of services. Jurisdictions with such a comprehensive plan can incorporate a combination of subdivision regulations, capital facilities program, zoning, and other implementing tools to influence future development and its costs and impacts.

Subdividers can find the comprehensive plan beneficial in locating and designing a subdivision. Before investing a large sum of money in purchasing or developing property, a prospective subdivider can assess whether the area is suitable (and acceptable) for development as building sites. He can more easily determine where areas are unsuitable for development because of adverse physical features (high ground water, flood hazard, steep slopes), or because of existing and anticipated lack of public and utility services.

A subdivider can realize practical benefits from a comprehensive plan both by understanding that subdivisions can be required to conform to a comprehensive plan, and by taking advantage of a provision in the MSPA that allows the planning board to waive preparation of all or part of the environmental assessment in a jurisdiction that has adopted a comprehensive plan, zoning regulations and a capital improvements plan (76-3- 210,MCA). This provision has been included in the MSPA because it is not reasonable for a subdivider to gather information that already exists in a comprehensive plan and is sufficient for proper public review.

3. Zoning and Development Permit Regulations

A majority of Montana municipalities enforce traditional zoning, which divides a jurisdiction into use zones and allows or prohibits certain land uses in each zone. Montana cities and towns have zoning authority under the Municipal Zoning Enabling Act (76-2-301 through 76-2-328, MCA). One important feature of zoning is that it regulates location of certain uses. Thus, a proposed subdivision within a municipality with zoning should be examined to ensure that it would conform to zoning requirements.

Accordingly, subdivision regulations contain a provision that a proposed subdivision must conform to adopted zoning regulations, a provision that helps assure that lot design, parking and other design features of a subdivision will meet the zoning provisions. Zoning regulations normally set requirements for lots and lot improvements that should be considered in subdivision approval, such as lot frontage, lot size, and off-street parking.

Traditionally, subdivision regulations have controlled the internal design, improvements and platting into building sites of land developments, while zoning has regulated the location, density, and the character of buildings and structures on lots. Thus, if the local government has both types of regulations, the platting and improvement of building sites and the character and location of buildings and structures on those sites would provide comprehensive public regulation of developments.

As has been mentioned, in Montana the traditional concept of subdivision regulations is not entirely applicable because of the primary criteria that each subdivision must meet. Under the MSPA a local government must also assess the proposed subdivision in terms of items that normally are addressed through zoning.

Several counties have adopted development permit systems, a form of land use

regulation that sets out on a county-wide basis certain standards that new developments must meet (Two statutes grant counties the authority to adopt zoning or development permit regulations: County Zoning, Sections 76-2-201 through 76- 2-228, MCA; and County Planning and Zoning Commission, 76-2-101 through 76-2-112, MCA). Permit systems differ from traditional zoning in that the jurisdiction is not divided into use zones. Permit systems are much like subdivision regulations in that developments are not prohibited from certain zones, but wherever they are located they must meet the standards set forth in the permit regulations. Permit regulations emphasize quality of development rather than the location and type of development.

4. Annexation

Subdivisions adjacent to, or near, municipal boundaries often create complexities in the approval process when the development is intended or likely to be annexed into the city. Because the subdivision is in the unincorporated area, subdividers naturally apply to the county commissioners for subdivision approval. With anticipated annexation, the difficulty comes because the design, layout, location and construction of streets, water and sewer systems, fire hydrants and facilities, and storm drainage facilities all should be compatible with those of the municipality. Unless the county commissioners work cooperatively with the municipal officials, the subdivision may be poorly designed for orderly annexation into the city.

The provision in MSPA that requires county commissioners to give municipal officials an opportunity to review and comment on a proposed subdivision near the city boundaries helps foster coordination [76-3-601(b), MCA.]

A second complexity occurs when the county may take cash in lieu of park land. That money goes into the county park fund, although the subdivision will soon be part of the municipality responsibility for providing services, including parks and recreation.

A third problem occurs when a subdivision is to be annexed immediately. The subdivider can be subjected to a number of public hearings for subdivision approval and annexation approval. Here again, coordination between the two processes can reduce much of the duplication and other difficulties.

5. Capital Improvements Program

A capital improvements program sets forth a schedule, costs, and funding sources for a local government's needed public facilities. A number of benefits can occur where a local government has adopted a capital improvements program. First, the local government has set down a schedule for systematically expanding or extending its public facilities and systems. The local officials know at the time of subdivision approval whether those services will be available to serve the subdivision and when they are expected to be extended. The subdivider may have to bear the costs of off-site improvements in order to extend public services to the subdivision where it would be completed prior to the

scheduled extension of services by the local government or where no extension has been planned.

The capital improvements program will help local government officials understand how a proposed subdivision will affect the provision of public services. In addition, it will help the prospective subdivider to know where and when public facilities will be available.

In some instances, local officials may have identified certain areas that are not suitable for development, and they do not expect to provide public services to those areas. Through their planning, local officials may have found that sufficient areas exist that are more suitable or more beneficial for development and may disapprove a subdivision in the unsuitable or less suitable areas.

In other instances, local officials may negotiate with the subdivider to pay for extending the public services under an agreement that as other developments occur in the area, the local government will arrange a pay–back to the developer for part of the cost of the extensions.

SUMMARY CAPITAL IMPROVEMENTS PLAN

PROJECT	COST ($000)	1983	1984	1985	1986	1987	FUNDING SOURCE
Sewer Treatment	250	250					EPA; Revenue Bond
Water Treatment	125	125					FmHA; Rev. Bond
Rest Home	200						
—1st Phase			120				
—Addition					80		G.O. Bond;
CBD Water Main	50		50				Rev. Bond
So. Side Sewer	5			5			SID
So. Side Paving	100			100			SID
So. Side Storm	234			234			G.O. Bond
Senior Center	75				75		G.O. Bond
Hospital	50				50		G.O. Bond;
First Av. Resurface	36					36	SID
Reseal Runway	30.6					30.6	FFA; Bond

SUMMARY CAPITAL IMPROVEMENTS PROGRAM. This sample capital improvements program sets priorities, identifies costs and sources of funding and establishes a schedule of construction for needed public improvements. In this example some capital improvements are addressed that may not directly affect an individual subdivision (which is typical in a Montana community).

The subdivider benefits from a capital improvements plan by knowing those areas within the local jurisdiction where services exist, extensions are planned, and where no extensions can be expected. A practical advantage for subdividers should be emphasized. The MSPA provides that in jurisdictions where a comprehensive plan, zoning regulations and capital improvements plan all have been adopted, no environmental assessment is required.

All of these opportunities for coordination, sharing costs, or avoiding unnecessary costs exist where a local government has thoughtfully prepared and adopted a capital improvements program.

As new subdivisions are approved, unexpected needs for new or expanded public facilities may occur, and the capital improvements plan may need updating sooner than planned. While the capital improvements program helps local officials plan and budget the costs of needed facilities extensions to serve new subdivisions, those subdivisions may create a need for re-assessment of the needs for new or expanded facilities.

6. Building Codes

Building codes establish standards for design and construction of buildings in order to promote public health and safety. The building codes specify the allowable materials and construction methods to be used in any new building. Montana local governments, upon certification by the state under Title 50, Chapter 60, MCA, may enforce the Montana Uniform Building Code. Many local governments have not adopted a building permit system. In those jurisdictions the state enforces the Uniform Building Code for public, commercial, and multiple-family residential buildings with more than four dwelling units.

Unlike subdivision regulations (and to a certain extent zoning regulations) which regulate the creation of building sites, building codes are applied after the lot has been divided and improved and the building is being constructed. Building codes are enforced by issuing building permits and conducting inspections.

Building permits are not intended to be used in place of zoning regulations to achieve some of the objectives of zoning. Cities often use building permits as a means to deny mobile homes, apartments, or other types of buildings in certain areas, or to require on-site improvements. These types of regulations should be enforced under a properly adopted zoning ordinance, not through use of building permits.

However, under a state Supreme Court decision (*Little v. Flathead*), a local government may refuse to issue a building permit where the proposed structure would not conform with an adopted comprehensive plan. As a result of this decision, local governments with adopted comprehensive plans can enforce the plan through use of their building permit system.

7. Local On-site Sewage Treatment Regulations

Montana law requires counties to adopt and enforce local regulations addressing on-site sewage treatment. Those regulations authorize the county sanitarian to inspect the design and installation of septic tanks and drainfields. Without the issuance of permits and site inspections counties have little means of enforcing the conditions and standards imposed by the DHES in subdivision approval under the MSIS.

The local on-site sewage treatment regulations often assist local officials in enforcing subdivision regulations because the sanitarian, in enforcing the sewage treatment regulations, becomes aware of new land divisions that may require subdivision review and approval.

8. Floodplain Regulations

Floodplain regulations usually complement subdivision regulations by identifying flood hazard areas. Title 76, Chapter 5, MCA (The Flood plain and Floodway Management Act) authorizes adoption of floodplain regulations on streams where the 100 year floodplain and floodway have been officially designated by the Board of Natural Resources and Conservation. Local governments also may adopt floodplain regulations under Montana's zoning enabling statutes. Most floodplain regulations allow development under certain conditions in the flood fringe, which is the area outside of the floodway. The floodway is defined as that portion of a floodplain that carries moving water during a flood.

The Model Subdivision Regulations, and most local subdivision regulations, require a subdivider proposing a development within 2000 feet of a live stream that drains 25 square miles or more to supply flood data for that stream.

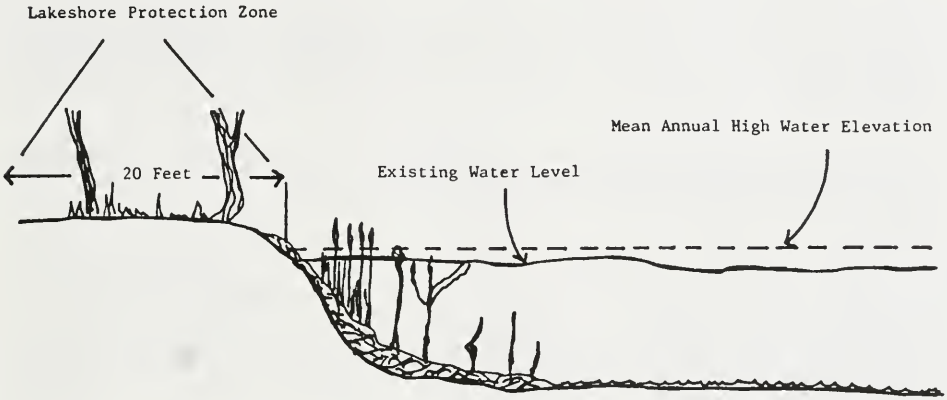
Under their subdivision regulations most local governments in Montana are authorized to deny subdivisions in flood hazard areas, which are any areas the local officials identify as prone to flooding. Because local officials have more discretion in defining flood hazard areas under their subdivision regulations, local subdivision regulations can be more effective than floodplain regulations in addressing flood hazards.

9. Lakeshore Regulations

A specific state statute (75-7-201 *et seq.*, MCA) authorizes local government to adopt lakeshore regulations to protect the shore and bank of natural lakes and manmade reservoirs. Lakeshore regulations apply to any construction or shoreline alteration within the lakeshore protection zone. That zone is the land within 20 horizontal feet of the mean annual high water mark (the average height of the highest elevation of the lake over the past five years) [see diagram on the following page].

In counties that have adopted lakeshore regulations, subdivision review can assist in enforcement of those regulations by assuring that lot configurations and subdivision improvements complement the requirements for lakeshore protection. Lakeshore regulations also could be adopted under the zoning enabling statutes.

DIAGRAM: LAKESHORE PROTECTION ZONE



E. ROLES AND RESPONSIBILITIES

1. General

A number of different public offices are involved in the review, approval and filing of a subdivision plat. In addition, private utilities, citizens, adjacent property owners, and, of course, the subdivider have roles in the process.

The review process functions most effectively when everyone involved understands the responsibilities of the other parties and participates in the process with a willingness to cooperate. The governing body should develop review procedures that promote coordination among affected parties, especially local officials.

The following outlines the basic roles and responsibilities of the various parties involved in subdivision review.

2. Governing Body

The governing body of a local unit of government is the most important public entity in the subdivision review process because the final decisions for approval or denial are made by that body. Many other offices and personnel make recommendations, but the final decision rests with county commissioners for subdivisions in the unincorporated area, and city councils (or commissions) for subdivisions within city boundaries.

Not only does the governing body approve or disapprove a preliminary plat of a proposed subdivision, but it must make important decisions regarding conditions for approval, improvements the subdivider must install, improvement guarantees, and the location of parkland.

The governing body acts on the final plat when the plat and all of the required documents and certifications have been properly obtained and submitted.

The governing body often finds itself caught in the middle of disagreements over approval of a subdivision. The subdivider, on the one hand, will support approval of the subdivision while neighboring property owners and other members of the public may oppose the project. Despite the fact that staff planners and the planning board make recommendations, it is the elected officials who must make the final decision, trying to take the action that will best serve the public interest.

3. County Clerk and Recorder

The office of the county clerk and recorder also is crucial because of certain decisions that must be made by that office. The clerk and recorder must review all land records, including subdivision plats, to determine whether they are eligible for filing and are in proper form. The clerk and recorder is responsible for determining whether a certificate of survey submitted for filing may be filed or, if under state and local requirements, the land division must be reviewed as a subdivision. Because of the multitude of statutes, administrative rules, legal opinions and local regulations, making that determination can be very complex and difficult.

In addition to plats and certificates of survey, the clerk and recorder must receive and file the statement of sanitation approvals issued by the Montana Department of Health and Environmental Sciences.

4. Planning Board

Planning boards usually serve as the review agency for the governing body. Planning boards, with professional staff, carry out the detailed examination of the preliminary plat, the environmental assessment and other information required for review. Typically, the planning board holds the required public hearing and takes testimony and receives comments from the general public and local, state and federal agencies.

Because the governing body usually relies on the recommendation of the planning board, the board has a responsibility to thoroughly evaluate the preliminary plat and related information to make a studied recommendation.

Planning boards that have no professional staff or retained consultants have an even greater burden. Not only do they have the responsibility for reviewing a subdivision, holding a hearing and making a recommendation, but the board members (who by law serve as unpaid citizens) must deal with the details of review, publishing notices, conducting hearings, preparing written findings of fact and performing all the other ministerial functions of preliminary plat review.

As an appointed citizen board, a planning board usually is somewhat removed from the day-to-day politics that face elected officials, and the board has an opportunity to view a subdivision from outside of the political arena. Planning boards can make their recommendations with a focus on the positive and negative impacts a subdivision will have on the overall jurisdiction and on the long term effects on community plans and policies.

5. Subdivision Administrator

In most local jurisdictions the staff planner serves as the subdivision administrator. However, in local jurisdictions that do not have a staff planner the ministerial duties of subdivision review must be handled by other personnel such as the city or county clerk, sanitarian, a planning board member, a consultant, the mayor or a county commissioner. The subdivision administrator is responsible for managing the subdivision review. He handles the details of the process -- examining the preliminary plat application for completeness, distributing copies to appropriate agencies and organizations, publishing notice and arranging a public hearing, making on-site inspections, notifying adjacent landowners, reviewing the plat and information for compliance with laws and regulations, checking courthouse and other records, drafting a written finding of facts, and drafting a recommendation for the planning board.

The subdivision administrator is available on a part-time or full-time basis, so the subdivider or his surveyor, engineer or consultant can contact the administrator with questions or comments about a proposed subdivision. The subdivision administrator typically meets with the subdivider in a pre-application conference to discuss the local regulations and the applicable standards.

Where persons might oppose or question the benefit of a proposed subdivision, they usually contact the subdivision administrator to express their opposition or to raise questions. Thus, because of his availability and the fact that he is expected to know the specifics of the regulations and the review procedures, the subdivision administrator becomes the focal point not only for most of the questions, comments and lobbying, but also for any controversy surrounding a particular proposal.

Often local governments rely on the subdivision administrator to assist the county clerk and recorder in determining whether a land division created by a certificate of survey is in fact eligible for filing as a certificate of survey (that is, without subdivision review), and whether a deed or other instrument of conveyance that creates a land division may be recorded without a survey or subdivision review.

6. Other Public Agencies

School districts, solid waste districts, fire districts, county road supervisors, park departments, and public works departments, are among the local government entities that should be given the opportunity to review a subdivision proposal and comment on the effects of the proposal on the provision of services.

Where possible, personnel in each department and district should quantify the need for additional personnel, equipment, space and maintenance, and try to estimate any additional costs that may be created by the subdivision.

Department heads can provide an overall benefit by working with the subdivider to try to find means of minimizing adverse impacts on services, and at the same time by trying to avoid imposing excessively expensive requirements.

Services are usually more efficiently or effectively provided where the department or district has developed capital improvement or long range plans. Such planning can be an important assistance to subdividers because it allows them to coordinate the design of their developments with the provision of services. Also, by participating in the subdivision review process the heads of departments and service districts can update their plans as subdivisions are approved and developed.

7. Private Utilities

Private companies providing electric, gas and telephone service should also be involved in subdivision review. Those utilities need easements or rights-of-way for utility lines, and the width, location and legality of those rights-of-way can be critical to the effective provision of those services.

Typically, a single company provides each of those services in any one area. All the affected private utilities are provided a copy of the preliminary plat or are contacted to examine the application and comment on how the subdivision will affect their provision of services.

As is the case with public agencies and districts, when private utilities work with the subdivider, the service can be provided with a minimal impact on the utility, and other customers and with a minimum of cost to the subdivider.

8. County Assessor, Appraiser, Treasurer

The county appraiser and county assessor will be involved in determining the taxable valuation of the property proposed for subdivision, and in preparing tax statements for each lot owner within the development. The appraiser also can help determine the appropriate cash-in-lieu payment for parkland where applicable.

The appraiser may conduct an on-site inspection of the properties to determine the appraised value of the lots and improvements. The assessor, using the appraisal, determines the amount of property taxes owed to the county, municipality if applicable, the elementary and high school districts, and any other taxing districts such as fire, solid waste, and conservation districts.

The appraiser's and assessor's offices also can provide valuable assistance during the subdivision review process. For example, one of these offices usually maintains a tract map which identifies the current owners of all property located in the county. This information greatly simplifies the task of sending notices concerning a subdivision to the owners of property adjacent to the land proposed for development. In addition, both offices can help the subdivider and the planner or planning board determine what effects the proposed subdivision will have on taxation.

Neither a final plat nor certificate of survey can be filed, unless the county treasurer certifies that there are no delinquent taxes on the property.

9. Affected Property Owners and the General Public

The MSPA specifically requires that owners and purchasers under contract for deed of property adjacent to a proposed major subdivision be notified. Other citizens may be concerned about a development, believing that the subdivision would affect the public resources, services, or the general public welfare.

Frequently these people are opposed to a proposed subdivision. In expressing opposition, they should be aware that a landowner has certain property rights, including a limited right to subdivide. Therefore, opponents should carefully assess their opposition to determine specifically what aspects of the proposed subdivision they oppose. They should weigh the reasons they oppose the subdivision against the rights of the subdivider.

Opponents will contribute most to thoughtful consideration of a subdivision when they express their concerns in relation to those factors the governing body must consider in approving or disapproving a subdivision: compliance with MSPA, the local regulations, and an adopted comprehensive plan, and evaluating the subdivision based on a weighing of the five primary review criteria.

10. The Subdivider, Engineers and Surveyors

The subdivider, of course, initiates the subdivision review process by applying for subdivision approval. To minimize difficulties a meeting with the subdivision administrator to discuss the local requirements, standards and procedures can be arranged. The single most important factor in easing the process of subdivision approval is for the subdivider to work cooperatively with the local government.

The subdivider often can avoid conflict and delay by hiring an engineer, surveyor or planning consultant who understands the benefits of the subdivision review process, and has technical skills and favorable attitudes toward cooperating with the local staff and officials.

The subdivider also should meet with department heads, supervisors of special districts, representatives of private utilities and others who would be affected by his proposed subdivision. By meeting and working with those entities that provide services, the subdivider usually can find ways to minimize their problems and his or her own costs.

11. Montana Department of Health and Environmental Sciences

The Montana Department of Health and Environmental Sciences (DHES) is responsible for the review of the water supply systems, the sewer and sewage treatment and disposal systems, solid waste disposal method and the storm water run off management systems. Before it will approve a subdivision the DHES must be convinced that (1) the water supply system will not only serve the needs of the proposed subdivision but will not adversely affect the water supply of the surrounding neighborhood; (2) the sewage treatment and disposal system will operate without causing a health hazard and without degrading surface water or ground water; (3) the solid waste will be disposed of in an approved manner; and (4) storm water will not create a nuisance for property owners, will not interfere with the operation of the water supply or sewage treatment systems, will be channeled in a manner that will not erode roads, approaches, borrow pits, and will not pollute state waters.

12. Local Health Agencies

As noted above, the DHES generally is responsible for approving sanitation facilities in subdivisions under the MSIS. In many counties the county sanitarian conducts the review of rural subdivisions containing five or fewer parcels. The sanitarian evaluates the site and information submitted by the subdivider to determine whether the proposed systems for water supply, sewage treatment and disposal, solid waste disposal, and drainage would meet the DHES standards. The sanitarian sends a recommendation to the Water Quality Bureau of DHES regarding the adequacy of the proposed sanitation facilities.

Under regulations implemented July 1, 1986, local health agencies that have qualified personnel may elect to assume approval authority for land divisions with five or fewer lots that have on- site water and sewer systems, and for subdivisions that will connect to municipal water and sewer systems if no extensions of the systems are required.

In many rural or small counties the staff planner and the sanitarian work in the same office. Although each has different review responsibilities under two different statutes, working closely with one another helps to make both review processes more effective and can reduce the time of review and number of unnecessary duplications.

Coordination between the staff planner and the sanitarian is extremely advantageous in handling parcels exempt from local review. Exempt parcels such as "family transfers" must be reviewed by the sanitarian, and the sanitarian's cooperation with the planner helps both the planning office and the county clerk and recorder keep track of certificates of survey and whether a division of land properly is exempt from subdivision review.

Part II
Subdivision Review Process

PART II THE SUBDIVISION REVIEW PROCESS UNDER THE MSPA

The local subdivision review process has three phases: (1) pre-application, (2) preliminary plat review, and (3) final plat approval and filing. This process is intended to minimize delay and confusion among the subdivider, planning board, and governing body, yet assure proper evaluation of the proposed subdivision to protect the public's concerns. The three-phase process allows for adequate preparation by both the subdivider and the governing body in developing quality subdivisions that meet the objectives of the community and the subdivider.

PHASE 1 PRE-APPLICATION

Subdivider:
- submits Pre-application

▼

Subdivision Administrator (or planning Board):
- meets with subdivider
- discusses requirements, procedures
- -inspects site

PHASE 2 PRELIMINARY PLAT

Subdivider:
- submits Prelim. Plat Application

▼

Sub. Administrator:
- reviews application
- publishes notice
- notifies adjacent property owners
- inspects site
- prepares staff report

▼

Planning Board:
- holds hearing
- makes recommendation
- drafts Findings of Fact

▼

Governing Body:
- makes final decision on prelim. plat
- issues written Findings of Fact

PHASE 3 FINAL PLAT

Subdivider:
- submits Final Plat Application

▼

Sub. Administrator:
- reviews application
- works with subdivider on full compliance
- makes recommendation
- ensures required improvements are installed

▼

Governing Body:
- gives final approval

▼

Clerk and Recorder:
- examines final plat
- files final plat, if in compliance

Several points can be made with respect to the subdivision review process:

- The process can provide adequate opportunity for negotiations and review before a design becomes final and considerable expenditures have been incurred by the subdivider.

- The level of detail and preparation costs increase as the process moves from the first phase (pre-application) through the third phase (final plat).

A. PHASE ONE -- THE PRE-APPLICATION MEETING

1. General

Although not required by the MSPA, the pre-application meeting is recommended. It can be the initial (and a vital) step in the subdivision review process. It is at this point that important discussions occur and working relationships between the subdivider and the local review agency are established.

In the pre-application phase the subdivider meets with the planning board or subdivision administrator prior to submitting the required preliminary plat. The subdivider provides information regarding the overall concept, location of the property and the major uses proposed. The local review personnel, in turn, inform the subdivider of community goals, plans, or policies that might affect the proposed development. They also explain requirements for on-site and off-site improvements, design standards, available utilities and associated requirements, and other policies and requirements adopted by the governing body. The local personnel may offer a general initial assessment of the proposed project.

The pre-application step is the most flexible phase in the entire review process, and provides the best opportunity to incorporate needed design considerations or changes. Subdividers can greatly benefit from the meeting(s) because they can become familiar with local regulations, allowing them to make changes before they have invested significant time and money.

In some jurisdictions, the local review personnel may be able to alert a subdivider that the location or character of the proposed development conflicts with an adopted plan or zoning, or likely will not meet the primary review criteria or public concerns. In the face of that advice, the subdivider may wish to completely reconsider his or her development plans.

A number of local governments give the subdivision administrator the sole responsibility for meeting with the subdivider, discussing the proposal, and providing him direction prior to a preliminary plat submittal. In other jurisdictions the planning board serves as the initial contact for the subdivider. This approach is most common in those jurisdictions where a small staff or no staff is available.

A third approach is for the subdivider to contact the subdivision administrator initially, and then subsequently meet with the planning board to further discuss the proposal. Under this alternative the planning board is not pressured to make a definite decision but does have the opportunity to comment on the overall design and community impact of the proposal and to suggest changes to it.

Another alternative is for a planning board to establish a plat review committee. This committee meets with the subdivider and carries out the purposes of the pre-application meeting. The committee can include representatives of municipal or county departments, school and fire districts, and utilities, as well as planning board members and the subdivision administrator.

A plat review committee is advantageous because members of the planning board are required to participate during this early stage of the review process. Participation by a plat review committee benefits the subdivision administrator by sharing responsibility for processing subdivisions and negotiating with subdividers.

2. The Information Packet

The pre-application phase is most beneficial when the subdivider obtains useful information. A prepared packet of pertinent information can greatly assist the subdivider. This information can include copies of background studies, comprehensive plans, zoning regulations and state and local subdivision requirements and procedures. Having these materials available for the subdivider's review and use early in the process will avoid many questions and delays throughout the review process.

3. Pre-application Information

The pre-application meeting will be more useful if the subdivider brings certain basic information about the proposal. A pre-application form can help assure that the subdivider will provide the information needed for an adequate assessment. The pre-application form can both specify needed information and indicate the existence of useful information, such as existing plans or zoning regulations.

The pre-application form could request a sketch plan that shows:

a. scaled dimensions
b. approximate lot boundaries
c. location of easements
d. utilities (existing and proposed)
e. proposed and existing rights-of-way
f. parks and open spaces
g. general terrain and natural features
h. existing structures and improvements
i. proposed improvements

4. Guidance on Local Requirements

At the pre-application meeting the subdivision administrator and other local representatives can identify major problems or concerns they may have with the proposal. Examples of potential problems include:

a. Amount of land devoted to parks;
b. Road patterns; road location and design; road easements or rights-of-way;
c. Layout of lots and blocks;
d. Drainage and grading plan;
e. Non-compliance with the comprehensive plan or zoning regulations;
f. Unsuitability of the site for the proposed development (water table, soils, steep slopes);
g. Likelihood proposal would be found not meet be approved after weighing the primary review criteria.

Too often subdivision administrators are tempted to redesign a proposal. They can provide guidance, advice, and examples regarding proper design, but trying to design a subdivision from "scratch" will take far too much time. Depending on the amount of the subdivider's experience, the subdivision administrator should take only as much time as the developer needs to grasp sound design principles applicable to the site.

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5. Site Inspection

Viewing the site of a proposed subdivision usually is necessary to understand the natural setting and the surrounding land uses. The subdivision administrator needs to make a site inspection, but the others involved in the pre-application phase will also benefit from the opportunity to visualize how the proposed subdivision will fit on the site. The members of the review team will be better able to convey their impressions to the planning board, and will be more knowledgeable during the preliminary plat review. Accurate field notes (and photographs) taken while making a site inspection will assist everyone in factual discussions back in the conference room.

To avoid any conflicts that might arise when the subdivision administrator and any planning board members enter the site to conduct an on-site inspection, the landowner should be notified of the site inspection. Also, trespass problems can be avoided if the local subdivision regulations include language such as that in the Model:

"Permission to Enter:

The governing body or its designated agent(s) or agency may conduct such investigations, examinations, and site evaluations as they deem necessary to verify

information supplied as a requirement of these regulations. The submission of pre-application materials or a preliminary plat for review shall constitute a grant of permission to enter the subject property."

The subdivision administrator will want to take to the site: the sketch plan submitted by the subdivider, notes from prior meetings, U.S.G.S. topographic maps or contour data supplied by the subdivider, any pertinent soils or geologic maps, a measuring tape, and a camera (to document the visit and supply visual information to the planning board).

At the site, the subdivision administrator compares the sketch plan with the actual terrain, noting: the approximate lot boundaries, road and utility locations, easements and rights-of-way, parks and open spaces, general terrain and drainage, natural features, existing structures and improvements and proposed structures and public facilities. Specifically, the site analysis includes the following observations:

Natural features

- surface water, evidence of ground water discharge areas, wetlands
- on-site or adjacent areas subject to flooding
- natural drainages: streams, swales
- slopes: steepness, aspect (direction slope faces)
- natural or unique vegetation areas
- soils, geologic structures, evidence of bedrock

Man-made features

- canals or irrigation systems
- existing buildings, structures, power or gas lines, or other utilities
- existing roads, rights-of-way, cuts and fills, culverts
- existing land uses: on site and on adjacent properties

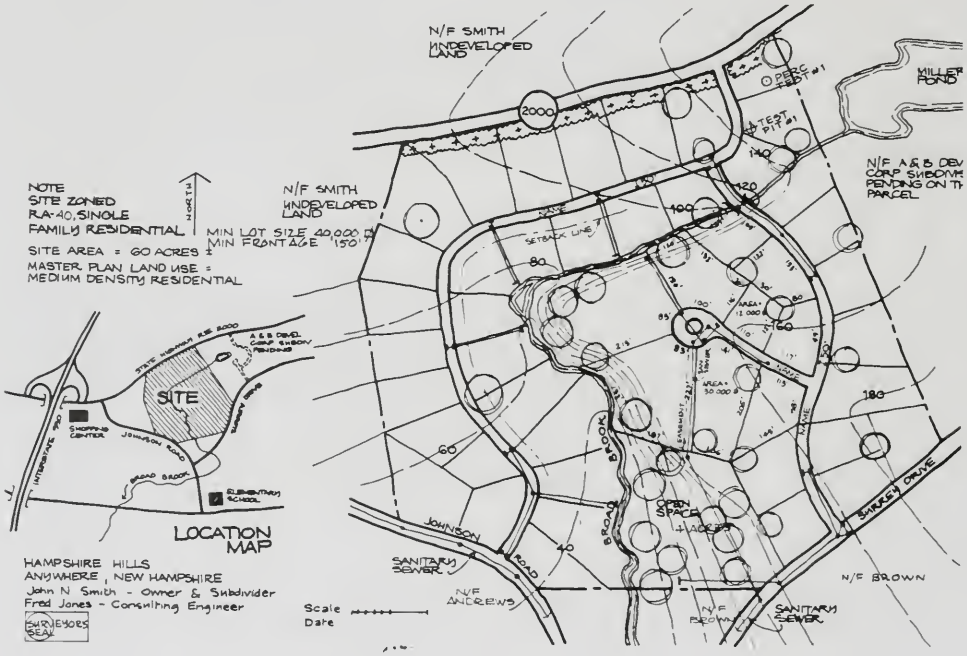
From these basic observations of existing features, the subdivision administrator can review the site in relation to the proposed subdivision plan. The considerations include:

- Location of lots: does each lot contain a suitable building site and reasonable access?
- If septic systems are proposed, does each site contain a suitable area for drainfields (sanitarian's help is useful)?
- Interior roads: needed cuts and fills, culverts or bridges, drainage or snow removal problems, proposed grades;
- Access points and routes from public roads;
- Orientation of lots: solar, wind, snow depths;
- Proposed drainage: where will storm water go?
- Does bedrock, high ground water or surface water present potential problems for construction, basements, utilities installation, septic systems?
- Are park areas useable: level, adequate size, appropriately located?
- Protection of wildlife habitat or other natural features;

Several steps can make the pre-application meeting more effective:

- **Start a file for the proposed subdivision; include the pre-application form, sketch plan, and notes of observations on site and at meetings.**
- **Review local and state time periods with the subdivider to eliminate any mysteries regarding the length of the review process.**
- **Provide the subdivider with the preliminary plat requirements: design standards, procedures, preliminary application form, and attachments.**
- **Keep detailed notes at the pre-application meeting. They could become important in a disagreement concerning the pre-application discussions.**

A SAMPLE SKETCH PLAN



B. PHASE TWO – THE PRELIMINARY PLAT

1. General

Review of the preliminary plat is the most important phase of the entire subdivision review and approval process because it is at this stage that local officials can require changes in the proposal, or deny the proposal before the subdivider has invested significant time and money in developing the project.

The preliminary plat review phase includes accepting the preliminary plat application with all accompanying materials, inspecting the site, preparing a staff report, publishing notice of a public hearing, holding a public hearing, preparing a findings of fact, and submitting the planning board's recommendation to the governing body. It culminates with the governing body issuing a written findings of fact and deciding whether to approve, conditionally approve or disapprove the preliminary plat.

The following describes the process for reviewing and approving the preliminary plat for a subdivision containing six or more lots (a "major" subdivision). A preliminary plat for a minor subdivision is reviewed under abbreviated procedures.

2. Preliminary Plat Application

To formally initiate the process of subdivision review and approval, the subdivider submits a preliminary plat application with certain required information. The MSPA sets out the basic framework for the required information and allows the local government to specify in its subdivision regulations exactly what must be submitted by the subdivider. The information required should be sufficient to allow an adequate review.

The subdivider, however, may elect to use the DHES/Local Government Joint Application Form to submit the information required for preliminary plat approval.

The Joint Application Form and the Model both set out the information typically required:

- A Preliminary Plat. Is a neat and scaled drawing of a proposed subdivision showing the layout of streets, alleys, lots, blocks, boundaries, utility easements, proposed improvements, and park lands;
- A Location or Vicinity Map. Shows the location of the subdivision within the jurisdiction, and its relationship to the overall community and to local services.
- A Contour or Topographic Map. Shows how the subdivision will affect the natural terrain, and how drainage and storm run off will be addressed;

- An Environmental Assessment. Describes (1) the physical information regarding soils, geology, surface and ground water, slopes, vegetation, wildlife, historic sites and visual features, and (2) the expected effects on local government services such as water supply, sewage disposal, solid waste disposal, roads, utilities, schools, emergency services, land use and housing.

In addition, local regulations may require such information as:

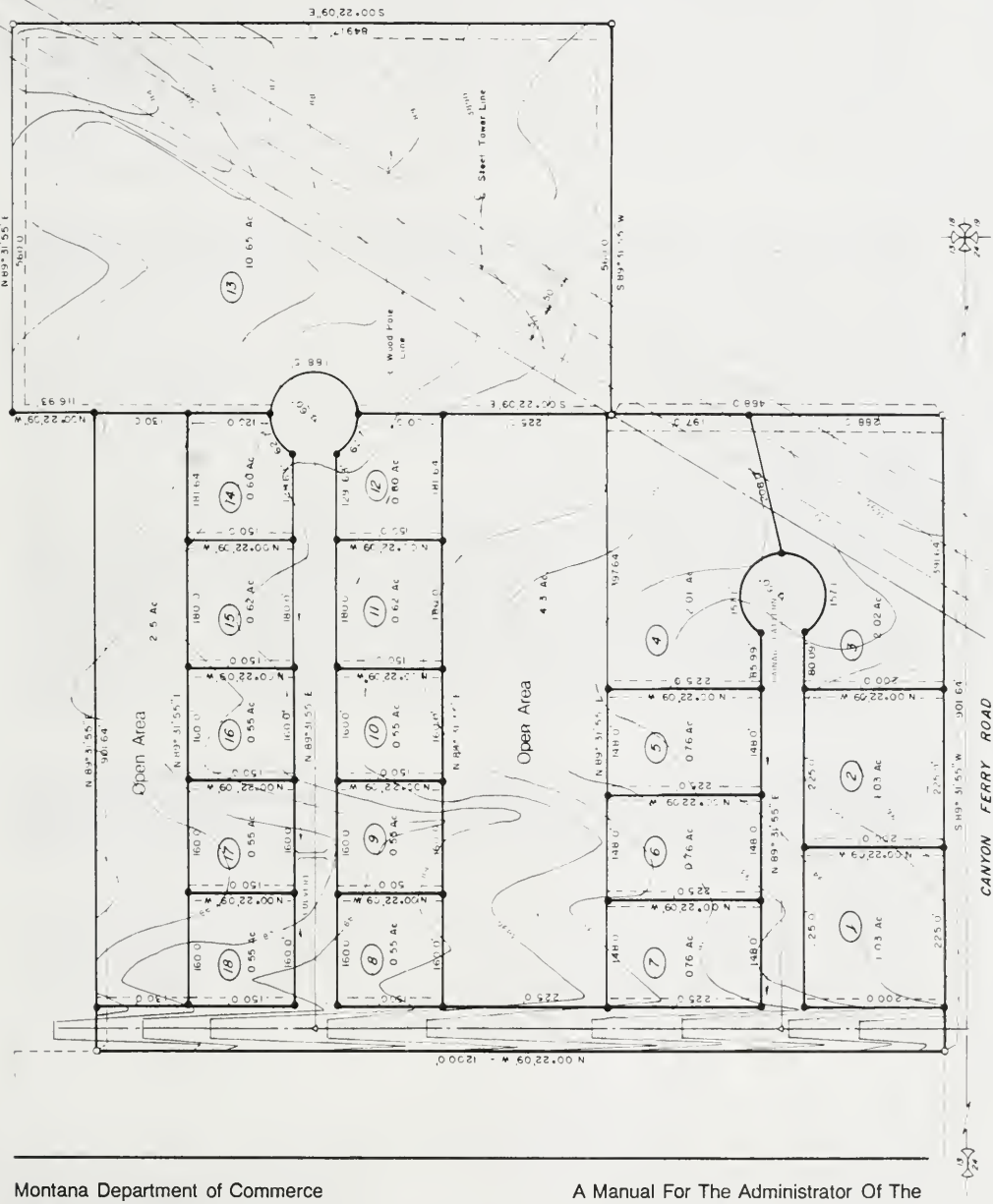
- a reduced copy of the plat for inclusion in mailed correspondence to adjacent landowners and state and local agencies;
- a list of adjacent landowners;
- covenants and restrictions, if any, to be included in deeds or contracts of sale;
- approach permits where proposed roads or access points will intersect with public streets or roads;
- a letter of approval from the appropriate governing body where a zoning change is necessary (if not handled concurrently with the subdivision proposal;
- a draft of the proposed improvements agreement, if applicable;
- a drainage plan;
- a draft of the bylaws of the homeowner's association, if applicable.

It is important that local regulations specify application deadlines and to whom the subdivider is to submit the preliminary plat application. Typically, the application is submitted to the subdivision administrator. The subdivision administrator usually has an office with regular (not necessarily full-time) business hours that are reasonably convenient for the subdivider.

Page 6 of the Model describes two optional procedures for preliminary plat submittal. Local units of government that have a subdivision administrator usually incorporate a procedure outlined in the Model as Option II. Under that procedure the subdivider submits the application 30 days before the planning board meeting. The subdivision administrator reviews the application and informs the subdivider whether the application is complete or if any further information must be submitted. The subdivision administrator does not accept or reject the application, but is prepared to advise the planning board as to the completeness of the application.

Where there is no subdivision administrator, the Model suggests Option I, a procedure whereby the subdivider submits the preliminary plat application to the planning board at a regular meeting. The planning board reviews the application and determines whether it is complete.

A SAMPLE PRELIMINARY PLAT



Under both options in the Model the 60 day review period for major subdivisions is triggered by the planning board's acceptance at a regular meeting. Both options provide for holding a hearing at the next regular meeting the following month. The planning board makes a recommendation to the governing body after the hearing.

Under Option I, the planning board without a subdivision administrator must accept the application at a regular meeting. If the application is complete, the hearing can be held the following month at the next regular meeting, and a recommendation sent to the governing body within the 10 day deadline.

If the application is incomplete the subdivider must wait one month to resubmit.

Option II, however, requires preliminary plat submittal 30 days prior to the planning board meeting. Under this option, the applicant has the opportunity to correct an incomplete application prior to the board meeting, rather than having to wait a month to resubmit.

Another alternative for jurisdictions with a subdivision administrator is to authorize the administrator to accept or reject an application based on submittal of complete information. Allowing the subdivision administrator to accept an application (and thereby trigger the 60 day period) would expedite the review process. However, it places a greater responsibility on the administrator, and reduces the time available to the planning board and governing body for their review.

More important than the timing is the review to ensure that the preliminary plat application provides the required information. By not accepting a preliminary plat application until all the information is provided, the subdivision administrator (or the planning board) is assured the review can proceed without delay or interruption after the missing data are collected.

A comprehensive checklist outlining the information that must be submitted as part of the preliminary plat application will greatly aid the subdivision administrator (or planning board) in determining if the information provided by the subdivider is complete. A sample checklist for checking a preliminary plat application is included in Appendix M.

A common complaint of subdividers is that additional information often is required after submittal of the preliminary plat application. To minimize that problem, the local subdivision regulations can clearly specify the required information and indicate the level of detail expected. The application should be thoroughly reviewed and the subdivider promptly notified of additional data to be submitted.

3. Public Notice

Local officials are required to hold a public hearing on a proposed major subdivision containing six or more lots within the 60 day period, and must publish notice of the hearing at least 15 days prior to the hearing. The owners and purchasers under contract for deed of adjacent property and the subdivider must be notified of the hearing by certified mail.

The notice of the time, place and date of the hearing must be published in a newspaper of general circulation in the county. That requirement has been construed by most people to mean the newspaper(s) published locally in the county.

The MSPA does not specify that the notice must be a legal notice. In the interest of wider readership the notice can be published as a news article in addition to a legal notice. One advantage of a legal notice is that a precise record is kept of the date of publication, and that record can be useful in the event that a procedural dispute arises later.

The best approach is to both publish a legal notice, and submit a news article giving the time, date and place of the hearing. In most counties the local newspaper publisher is willing to cooperate in publishing news stories or articles about public hearings.

The subdivision administrator needs to "count backwards" from the scheduled hearing date to ensure that the hearing notice appears in the paper at least 15 days prior to the hearing. In counties where the local newspaper is published weekly rather than daily, only a limited number of issues are available in which to publish notice 15 days prior to the hearing.

The MSPA requires that the subdivider and adjacent property owners be notified of the hearing by certified mail. Mailing a copy of the public hearing notice submitted to the newspaper is an effective means of notifying those persons. A brief explanation of the project and a small map of the subdivision can be included in the mailing.

The most time-consuming aspect of the mailing to property owners is obtaining a list of the owners. This information is available from the records in the county clerk and recorder's, assessor's or appraiser's office. The county clerk can assist in using the proper index and developing the list of adjacent property owners.

Some Tips:

- **A number of local subdivision regulations require the subdivider to provide the names and addresses of adjacent property owners as part of the preliminary plat application. This requirement saves the subdivision administrator significant time in searching records, although some effort to verify the names will help minimize errors.**

- **The public will benefit from a hearing notice that is complete and easy to understand. Often a small vicinity map is included at the bottom of the notice. The notice can mention that materials pertaining to the proposed subdivision are available for review at the courthouse or city hall. A sample hearing notice is included in Appendix M.**

- **Often copies of the notice are posted at various public facilities (e.g., the post office, courthouse, city hall). Also posting notice at the site can be helpful to the general public and nearby property owners.**

- **Keeping records of dates of published notices and records of certified mailings is important to defend against potential claims that proper notification procedures were not followed.**

4. Site Inspection

A site inspection at the preliminary plat review phase is necessary. The inspection allows the subdivision administrator and other local officials to observe the site in relation to the specific subdivision proposal. This inspection considers the physical features of the site as they relate to the specific proposal.

The preliminary plat and environmental assessment incorporate detailed information about the proposed subdivision that focuses the on-site evaluation on the following aspects:

- Specific location of lot boundaries, roads, park areas;
- Specific information on culverts, bridges, cuts and fills, grading, and drainage swales and other facilities;
- Location of access roads and approaches onto public roads;
- Availability of legal and physical vehicular access to each lot;
- Suitable building sites on each lot;
- Grades and widths of each proposed road or cul-de-sacs;
- Surface waters and floodways that might affect the subdivision; (Artificial water systems such as canals, reservoirs and irrigation systems should be observed to determine how they may affect, or would be affected by, the subdivision.);

- Any evidence of high ground water or wetlands in relation to proposed lots, septic drainfields, roads, storm drainage;
- Soils and slopes: highly erodible soils, steep slopes; toes of slopes that might be cut for roads (potential slumping or sloughing);
- Evidence of bedrock that might affect drainfields or installation of utilities;
- Natural features: vegetation, wildlife habitat, visual; areas that are better left undisturbed;
- Historic features that should be preserved.
- Utility locations (existing and proposed) and easements.

5. Review of Environmental Assessment

An important feature of the process of reviewing major subdivisions is the environmental assessment that the subdivider must submit as part of the preliminary plat application [76-3- 504 (1), MCA]. In that assessment the subdivider provides information about the development, its effects on community services and its impact on the physical environment.

The assessment provides information that will assist in an effective review. The assessment suggested in the Model asks for environmental information basic to proper subdivision design and includes sections on surface and ground water, wetlands, geology, soils, slopes, vegetation, wildlife and historic sites. It also asks for information necessary to allow the community to plan for additional or expanded public services that may be required, and includes sections on water supply, sewage disposal, solid waste collection and disposal, roads, utilities, emergency services, schools and land use.

The assessment also provides basic information pertaining to the subdivision: number and sizes of lots, number of dwelling units, anticipated number of residents and school age children, average daily vehicle trips, and the expected change in taxation.

While the subdivider is responsible for preparing the environmental assessment, the subdivision administrator and the planning board have a responsibility for reviewing the assessment for completeness and accuracy. The subdivision administrator's review of the assessment should take place soon after submittal of the preliminary plat application so that questions can be raised or missing information supplied before local and state agency review begins. Here again, a checklist of information required in the assessment and a checklist of impacts on community services and the physical environment can be useful aids. [A sample copy of these checklists are included in Appendix M.]

The subdivider can complete the assessment using existing information and need not conduct field studies to collect original data. However, most subdividers will find that contracting with experienced planning or engineering consultants to prepare the assessment can prevent delay and frustration.

The requirement for submitting an environmental assessment does not apply to the first minor subdivision from a tract, and all or part of the assessment may be waived by the planning board for other minor subdivisions and subdivisions that comply with an adopted comprehensive plan or contain fewer than 10 parcels and encompass less than 20 acres. Also exempt from the environmental assessment are subdivisions totally within master planning areas where zoning regulations and a capital facilities plan have been adopted [Section 76-3-210, MCA.].

6. Agency Review

Typically, the governing body has adopted review procedures that require copies of the preliminary plat application be submitted to affected utilities and to local agencies, such as school, fire, and conservation districts, sheriff or police departments, road supervisors, weed districts and directors of public works. Agencies' comments are vital to understanding the expected impacts of a proposed subdivision.

The planning board and governing body may find it appropriate to require design or other changes in the proposal to lessen the impact on services provided by local agencies or service organizations.

Copies of the preliminary plat and application may be sent to state and federal agencies, such as the Montana Department of Fish, Wildlife and Parks, Bureau of Mines and Geology, U.S. Soil Conservation Service, or Department of Natural Resources and Conservation for their review and comment.

These agencies can offer useful comments on a proposed subdivision in that they often have technical knowledge and information that is not readily available at the local level. The Department of Transportation (DOT) can provide information on proper location and design of approaches onto public roads, and must approve any approaches onto state highways. The DOT also has abundant information on highway conditions and classifications in counties, has average daily traffic counts for many segments of state highways, and can advise local officials on how to project expected traffic volumes generated by a proposed subdivision.

The state Bureau of Mines and Geology has excellent data on ground water and geological formations, and offers sound advice on basic physical environmental and resource conditions. The U.S. Soil Conservation Service (SCS) often has detailed soil surveys and can give advice on the suitability of the soils for the planned development. Often the SCS requires a planning board or its staff to work through the local conservation district. Most planning boards include a conservation district supervisor as a member of the board, and that arrangement facilitates access to SCS assistance.

The state Department of Natural Resources and Conservation can provide valuable assistance in delineation of floodplains, and gathering data on surface and ground water conditions.

The Department of Health and Environmental Sciences (DHES) works closely with local governments in subdivision review. Its Water Quality Bureau assists local officials in understanding the circumstances surrounding the sanitation facilities and water quality and quantity. Other bureaus can assist with solid waste, air quality, medical and emergency medical services.

The Department of Commerce Community Technical Assistance Program (CTAP) provides assistance and information regarding the legal aspect of subdivision regulations and other land use issues, proper subdivision design, and local government budgeting and fiscal management of community services. The CTAP also provides assistance to local officials by helping them find the appropriate persons and agencies within state government that can assist with a particular problem.

The state Department of Fish, Wildlife and Parks offers technical advice relating to wildlife and wildlife habitat, water quality, and streambank protection.

The Montana Department of State Lands, the U.S. Forest Service and the U.S. Bureau of Land Management can offer information and cooperation where state and federal lands may affect or be affected by a proposed subdivision.

Seeking comments from local, state and federal agencies is especially useful for those units of local government that have no professional staff to assist them.

7. Staff Report

The results of the subdivision administrator's review and research and the comments from local, state and federal agencies will be useful to the planning board, governing body and general public when compiled into a concise, easily understood staff report.

This report will be most useful when it is prepared prior to the public hearing, allowing the planning board and subdivider to read the report in advance. The staff report will be the primary document the planning board uses in making a recommendation.

Having an outline of a standard format for staff reports will help the subdivision administrator quickly draft a report that addresses the important points and presents the information and any staff recommendations in an understandable manner. The staff report should answer questions and bring key issues into focus. It should be concise and deal only with points or issues pertinent to the proposed subdivision. In writing the report the subdivision administrator should avoid useless background, pointless generalities, and should not raise irrelevant issues or questions through vagueness or incomplete research.

Where a local government does not have a paid staff, someone must prepare a report. A planning board member, a member of a plat review committee, or an appropriate city or county official are possible persons who could be designated to prepare the vital staff report.

The staff report can be written in four major parts:

a. Introduction:

This section describes the proposed subdivision, including the location, type (e.g., residential, commercial, mobile home), number and average size of the lots, number of dwelling units, current land use, current zoning if any, and compliance with comprehensive plan.

b. Background:

This section gives a brief history of the application including pre-application meetings, dates of site inspections, other land divisions in the vicinity, adjacent land uses. The background section also may indicate the important future events such as hearings, planning board meetings, decision deadlines, governing body meetings, and the end of 60 day review period for major subdivisions. This section can list the materials that accompany the preliminary plat application (e.g., covenants, maps, drainage plans, draft improvement agreements).

c. Discussion and Findings of Fact:

This is the "meat" of the staff report. The subdivision administrator analyzes the environmental assessment, the anticipated effects on community services and the environment, comments from agencies, and materials such as improvement agreements, drainage plan, and covenants.

This portion of the report should assess the issues pertaining to compliance with the local design standards and make any suggestions for changes in design of the project. The subdivision administrator should comment on how the proposed subdivision would comply with the adopted comprehensive plan, zoning, floodplain regulations and other adopted regulations or policies.

Depending on the policies of the planning board or governing body, the subdivision administrator may include a draft finding of fact that addresses the review criteria. The governing body must make such a finding, and it is appropriate for the subdivision administrator to assist the planning board in recommending a finding of fact and a determination whether the subdivision would comply with the provisions of the MSPA.

Some planning boards prefer to weigh the review criteria themselves and determine whether the subdivision would comply with the provisions of the MSPA. In these

jurisdictions the subdivision administrator's involvement is limited to preparing the factual statement of circumstances surrounding the proposal.

Several planning boards have had success using a plat review committee that meets with the subdivider and works with the subdivision administrator in drafting a finding of fact, weighing the review criteria and suggesting to the planning board whether the subdivision would comply with the provisions of the MSPA.

An outline of the Discussion section of the staff report might include:

1. An analysis of the:
   - environmental assessment
   - agency comments
   - drainage plan
   - improvements agreement
   - covenants

2. A written finding of fact that weighs:
   - whether the subdivision complies with the comprehensive plan, zoning and other regulations and policies;
   - whether the subdivision conforms to the MSPA, design standards and procedures of local regulations,
   - whether the legal and physical access is provided;
   - whether utility easements will be provided.

d. Recommendations:

Some planning boards and planners prefer that the subdivision administrator not make recommendations regarding approval or disapproval of a subdivision, but simply provide the factual information and research questions that likely will arise. In most cases, however, the subdivision administrator makes recommendations, both as to whether a subdivision would conform to the review criteria of 76-3-608, MCA, and whether it should be approved or not, or approved with conditions.

The planning board and subdivision administrator need to have clear policies on what the staff report will contain. A sound approach is to develop a standard outline or checklist to use as a guide.

Where the subdivision administrator is expected to make recommendations, those recommendations should be supported by concise but thorough justifying statements. When conditional approval is recommended, the conditions need to be specifically and clearly set forth. When disapproval is recommended, the reasons must be clearly and

specifically set forth. When approval is recommended supporting statements should be drafted. Where public opposition or questions about the subdivision have emerged, the subdivision administrator should address those issues in recommending approval.

In addressing the review criteria, the staff report will most benefit the planning board if it sets out an assessment of the expected actual effects of the subdivision based on a weighing of the review criteria, and a resulting recommendation as to whether the subdivision would comply with the MSPA.

THE STAFF REPORT: The report should be clear, understandable, and concise. Jargon, vague terms, and generalizations confuse the lay reader. Pertinent attachments, including maps, covenants, and improvement agreements, can greatly aid a reader in understanding a subdivision proposal and the relevant issues. Sending copies of the staff report to the planning board and subdivider prior to the public hearing allows them to become familiar with it and allows them to be better prepared to participate in the hearing. Copies also should be made available to the public both before and at the hearing.

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8. Public Hearing

The required public hearing on a proposed subdivision typically is held by the planning board, usually at a regular meeting.

The public hearing is most productive if the staff report and the comments of reviewing agencies are available so that the public has the most comprehensive information of circumstances surrounding the proposed subdivision.

The following is an outline of typical procedures at a public hearing:

- Chairman opens hearing, explains the purpose and reads the notice;
- Subdivision administrator discusses staff report, outlining the facts of the proposal;
- Subdivider describes proposal;
- Subdivision administrator reports on agency comments, analysis of environmental assessment, compliance with plans, regulations and policies, conformance with design standards, recommendations for changes, findings of fact that weighs the review criteria, and (if policy of planning board) recommendations regarding determination of compliance with the provisions of MSPA, and recommends approval, conditional approval or disapproval and gives supporting reasons;
- Chairman, or subdivision administrator, reads any letters received;
- Members of audience make comments or ask questions; and
- Chairman moderates any discussion arising from public comments or questions.

Keeping a careful record of the hearing, with names of persons and their testimony will be important if any procedural questions or litigation arises in the future. Verbatim minutes are not necessary, but tape recordings of the hearing may prove to be valuable in resolving later disputes or disagreements concerning the testimony.

Court reporters can be retained to take a verbatim record of testimony. Most court reporters charge reasonable fees for taking the testimony. They charge substantially for drafting a written copy of the proceedings, but such a record is only needed in the event of litigation or disagreement. Where a party challenges the local government's interpretation of the proceedings, they should bear the cost of having the court reporter draft the written record.

9. Planning Board Recommendation to Governing Body

The planning board is required to make a written recommendation to the governing body within 10 days after the public hearing. Most local subdivision regulations require the planning board to make recommendations regarding (1) the findings of fact, (2) the determination that the subdivision would or would not comply with the provisions of the MSPA, and (3) the approval, conditional approval or disapproval of the proposed subdivision.

The letter of recommendation from the planning board to the governing body normally sets forth each of the board's recommendations and outlines the reasons supporting those recommendations. Most planning boards enclose the staff report, copies of letters or technical comments, and the written transcript or minutes of the hearing with the letter of recommendation. Those documents are transmitted to the governing body with the preliminary plat application and accompanying documents.

The governing body is better able to understand all of the issues concerning a proposed subdivision when the subdivision administrator (or other representative of the planning board) meets with the governing body to discuss the proposed subdivision, explain the key points, problems or recommended changes (if any), recommended conditions for conditional approval, and answer questions. Often in a meeting with the governing body the subdivision administrator can answer questions or provide information that was not addressed in the written materials.

10. Action by the Governing Body

The governing body must approve, conditionally approve or disapprove the preliminary plat application for a major subdivision within 60 days after the application was accepted as complete. The governing body shall issue a written Findings of Fact that discusses and weighs the following criteria (pursuant to 76-3-608, MCA):

a. Effects on agriculture, local services, the natural environment, wildlife and wildlife habitat, and the public health and safety;

b. Compliance with the requirements of the MSPA, and the regulations and review procedures of these local subdivision regulations;

c. The provision of easements for the location and installation of any needed utilities; and;

d. The provision of legal and physical access to each parcel within the subdivision and the notation of that access on the applicable plat and any instrument transferring the parcel.

In practice, the governing body's approval is at least a two-step decision and can include additional considerations. As a minimum, the governing body's decision must be based on:

(1) whether the subdivision would conform to the MSPA, the standards and procedures specified in the local regulations, provision of legal and physical access, and provision of utility easements.

(2) a weighing of the 5 primary review criteria.

In addition, local subdivision regulations may specify that the subdivision must conform to an adopted comprehensive plan. A proposed subdivision must comply with zoning, floodplain and other regulations.

A local government may take one of three actions with regard to the preliminary plat:

1. Approval. The governing body may wish to approve the preliminary plat, which allows the subdivider to proceed in preparing and submitting the final plat without meeting any additional conditions.

2. Conditional approval. The governing body may conditionally approve a subdivision, and must specify in writing the conditions that must be met before a final plat may be submitted for approval. A copy of the conditions must be sent to the subdivider.

Conditions for conditional approval may include such items as: design changes the governing body requires, certain accompanying documents such as an improvements guarantee, DHES approval, or reasonable off-site improvements that serve the subdivision. If the preliminary plat does not conform to the local subdivision design standards, conditions of approval may include the obtaining of a variance* from the pertinent provisions of the regulations or that the requirements be met before a final plat is approved.

If the required changes in the preliminary plat would result in a substantially different plan than was originally presented, the governing body may require the planning board to review a revised preliminary plat.

3. Disapproval. The governing body disapproves the subdivision if it finds that a subdivision would fail to comply with the requirements of MSPA or the local subdivision regulations, would not be in conformance with an adopted comprehensive plan, or would not comply with adopted zoning or other land use regulations. Subdivision denial ends the review process, and the governing body must send a written statement to the subdivider outlining the reasons the subdivision was disapproved.

When the preliminary plat is approved or conditionally approved, the governing body may not impose any additional conditions or requirements as a prerequisite of final plat approval.

11. Delays; Extensions

Circumstances may arise that prevent local officials from completing the preliminary plat review within the 60 day period. The most common occurrence is lack of a quorum at a planning board meeting. Often absence of planning board members is quite legitimate, given such factors as Montana's adverse weather conditions or certain seasonal obligations for farmers and ranchers. However, these delays understandably frustrate subdividers.

Situations can arise in which subdividers may feel that an extension of time would be in their best interest. The subdivider may need more time to obtain data that would help him gain approval, to secure financing of the property or to install required improvements.

To accommodate the unforeseen situations that may prevent timely action on a subdivision plat, the MSPA allows an extension of the 60 day preliminary plat review where the subdivider consents to an extension.

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*Variances are not automatically granted. The applicant must apply for the variance and local officials must make certain findings of fact in order to grant a variance.

Local officials need to be clearly justified in asking a subdivider to consent to an extension of the preliminary plat review period. The governing body has leverage over the subdivider who does not agree to an extension in that they can disapprove the subdivision and force him to begin the process again. Most subdividers are unwilling or financially unable to challenge such a disapproval in court.

Frequent requests for extensions of the review period often indicate a weakness in the review process. Jurisdictions facing such problems should examine their procedures to develop a process that can complete the review within the statutory 60 days.

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12. Sale of Lots Under Provisions of Escrow Account

After the approval or conditional approval of a preliminary plat, the subdivider is authorized under Section 76-3-303, MCA, to enter into contracts for deed with buyers of lots in the proposed subdivision under the following circumstances:

a. That the buyer make the payments into an escrow account with a financial institution chartered to do business in Montana;

b. That the payments by buyer may not be transferred to the subdivider until the final plat is filed with the clerk and recorder;

c. That if the final plat is not filed with the clerk and recorder within 2 years of preliminary plat approval,* the escrow agent must refund the payments to each purchaser;

d. That the contracts conspicuously specify: "The real property which is the subject hereof has not been finally platted, and until a final plat identifying the property has been filed with the county clerk and recorder, title to the property cannot be transferred in any manner."

e. That the county treasurer has certified that the real property taxes levied on the land to be divided are not delinquent.

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*NOTE: The two year limit on entering into contracts for deed without filing a final plat is not consistent with Section 76-3- 610, MCA, which allows the preliminary plat approval to remain in effect for up to three years. However, the two year restriction on contracts for deed protects the buyer from undue delay in the filing of a final plat, which allows legal transfer of title or possessory interest in the property.

The purpose of the provision is to give subdividers an opportunity to gain a better financial position for funding improvements and other costs. Even though the subdivider does not receive any of the payments, the funds held in escrow demonstrate to financiers that the subdivider has financial security both in the escrow funds and in the form of willing lot buyers.

The fact that only chartered financial institutions may hold the escrow accounts helps protect the buyer. One problem with the provision is that the statute does not require that the governing body be informed about the escrow accounts, and so it cannot ensure that this provision is being used legitimately.

C. PHASE THREE -- THE FINAL PLAT

1. Preliminary Plat Approval In Force

Under the MSPA the preliminary plat approval is valid for a period of up to three years. At the end of that period the subdivider may request an extension of the approval. The governing body may extend the preliminary plat approval up to one additional year, except that the approval period may be extended for longer than one year if the subdivider enters into a subdivision improvements agreement that includes the extended approval period as a specific provision.

During the preliminary plat approval period the subdivider must complete the final plat requirements, including installation of improvements, in order to file the final plat.

Frequently, a subdivider is not able to complete the engineering, surveying, or construction, or to complete financial arrangements during a one year period. These difficulties are common with larger developments where a large amount of work must be completed and the costs are greater. At the time of preliminary plat approval the governing body can assist the subdivider by discussing the anticipated schedule for final plat completion, and the likelihood of completing the financing. The reasonable needs of the subdivider in completing this final (and expensive) phase of the development are an extremely important consideration in setting the duration of preliminary plat approval.

However, another important public concern is the effect on the community's plans, development patterns, and future extension of public services in situations where the final plat is not filed for 3 years or more. A number of new local officials may be in office, and unless careful records have been kept, the public officials may be unaware of the preliminary plat approval and have not considered the approved development in any current planning.* Also, ownership of the subdivision may have changed and the subsequent owner may be less enthusiastic about meeting the conditions and requirements of preliminary plat approval.

Where a subdivider presents a sound case that a longer time period is warranted (for example, developing the subdivision in phases is a legitimate reason for a longer approval period) the governing body will want to include the extension of preliminary plat approval as a specific condition in the improvements agreement.

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* Newly elected officials and new planning board members benefit from a briefing by the subdivision administrator regarding the status of proposed subdivisions under local government review.

2. Final Plat Submittal

The Model specifies that an application for final plat approval must be completed and submitted with one signed cloth– backed or opaque mylar copy, one signed reproducible copy and two blue–line paper copies of the final plat. In addition, the required accompanying documents and the final plat review fee must be submitted.

Prior to final plat submittal, a registered land surveyor must complete a field survey in compliance with the "Uniform Standards for Monumentation" adopted as Administrative Rules of Montana(ARM) 8.94.3001. Engineering plans must be drawn, and either the required improvements must have been installed or an improvements agreement approved to allow deferred installation of improvements.

The final plat must meet the drafting requirements of the "Uniform Standards for Final Subdivision Plats" (ARM 8.94.3003). The plat also must conform to the approved preliminary plat and have incorporated all the modifications and conditions approved by the governing body.

The subdivider may elect to submit a final plat for only a portion of the property approved under the preliminary plat.

Typically, the subdivider submits the final plat application to the subdivision administrator. The other common procedure is to submit the final plat at a regular meeting of the planning board. Whoever accepts the application checks the materials to determine whether the application is complete. A checklist greatly assists in checking the numerous certifications and accompanying documents that must be submitted.

3. Final Plat Review

In reviewing the final plat the first step is to assure that it conforms to the approved preliminary plat and any conditions required by the governing body. A standard checklist can help in an orderly review of items such as lot design, road design and location, location and size of parkland, size and location of culverts [see example checklist in Appendix M]. In addition to the items on a standardized checklist, the planning board and subdivision administrator should review the written statement of conditional approval and check each condition, item by item, to assure that it has been met.

The MSPA specifically prohibits a local government from imposing additional conditions on a final plat that were not included in the preliminary plat approval.

A number of persons outside of the planning board or staff can be involved in the review. The plat, or necessary attachments should be made available to:

a. The examining land surveyor (if applicable) to review for survey or drafting errors and omissions;

b. The county (or city) attorney to review the certificate of abstract, and other legal documents such as dedications; and
c. the county treasurer to certify that no property taxes on the property are delinquent.

The improvements agreement and financial guaranty document can be the most important considerations in plat approval. Deferred installation of improvements often create serious problems for local government because the improvements may not be installed or may not be properly installed, and the cost of installation can fall on the local taxpayers.

Usually the improvements agreement is executed at the final plat phase, but to qualify for an extension of preliminary plat approval beyond one year the agreement must have been made as part of the preliminary plat conditions.

The agreement allows the subdivider to defer installation of part or all of the approved improvements, rather than installing the improvements prior to final plat filing. The agreement protects the public interest only if it specifies a date (or schedule) for completing the improvements, requires that the improvements meet subdivision or referenced standards, and that the installation of improvements are inspected by a representative of the local government.

The leverage available to local government to ensure that the deferred improvements are properly installed, and on time, is a financial security guaranteeing the agreement.

The only reliable protection the local government has against default on installing deferred improvements is a carefully drafted financial security document that can be readily liquidated by the governing body.

The purpose of the improvements agreement is to benefit the subdivider by relieving him of high "front end" costs. **The governing body will find that the more improvements that are installed prior to final plat approval the fewer the opportunities for default and subsequent administrative difficulties.**

The Model recommends financial guaranties for securing improvements agreements, and Appendix L of this Manual explains the options and offers suggestions.

After the preliminary plat has been approved, an on-site evaluation allows inspection of any improvements that are installed prior to final plat approval and checking of the survey

monuments. A site inspection of the property also serves as a refresher and helps in making a recommendation to the governing body. Using the approved preliminary plat maps and improvements agreement the subdivision administrator can inspect the site for compliance with local regulations and any conditions imposed by the governing body.

The site visit can include:

- measuring lot boundaries, right-of-way widths, and cul-de-sac radii;
- observing widths of approaches, and distances separating approaches;
- noting cuts and fills, grading, and drainage facilities;
- observing installation of utilities and other facilities.

Another site inspection is necessary after the subdivision improvements have been completed. Because at least part of the improvements likely will be completed prior to final plat approval the site inspection can document compliance of the:

- final cuts and fills, grading, and drainage facilities;
- final road grades, widths, and installation of culverts;
- final park development;
- final installation of utilities and sanitation facilities.

Having other local staff, such as the sanitarian and road engineer involved can be very helpful in checking for compliance with local regulations and conditions.

4. Recommendation by the Planning Board

Once the installation of required improvements has been inspected, and the final plat and all accompanying materials and have been reviewed and found to be in order, the subdivision administrator reports the findings to the planning board (some jurisdictions may require the subdivision administrator to report directly to the governing body). The planning board submits a report and recommendation for action on the final plat to the governing body.

5. Approval by the Governing Body

The governing body approves the final plat after it is satisfied that the plat conforms to the drafting, surveying and monumentation requirements of the MSPA and adopted administrative regulations; the conditions of preliminary plat approval have been met; and all improvements have been installed or the future installation is secured by an improvements agreement. Because final plat approval involves checking of detailed and technical items, the planning board and subdivision administrator's recommendations are especially helpful to the governing officials in making the decision to approve the final plat.

The chief executive of the governing body – the chairman of the county commissioners or the mayor of a municipality – signs both the cloth–backed (or opaque mylar) copy and the reproducible copy of the plat.

After approval the governing body either returns the final plat to the subdivider or assumes responsibility for submitting the plat to the county clerk and recorder for filing. Local regulations need to specify which party is responsible for submitting the approved final plat to the clerk and recorder for filing.

Local subdivision regulations protect the subdivider against undue delay by specifying a reasonable time period (typically 35 days) within which the local government must review and take action on a submitted final plat.

6. Filing of Final Plat

The county clerk and recorder is responsible for ensuring that the final plat is in proper order for filing. The review by the subdivision administrator, county or city attorney, examining land surveyor and planning board, and the approval and signing by the governing body should assure that the plat and accompanying materials are ready for filing.

When satisfied the final plat is in order the county clerk and recorder files the final plat, and enters the name of the subdivision in a plat index. The cloth–backed (or opaque mylar) copy is placed in a plat book or in plat file (often a hanging file). A paper copy usually becomes the copy available for public use. The mylar or transparent copy usually is filed in a separate location and is used to make paper copies on request.

A number of supplementary documents must be submitted and filed with the final plat, such as DHES sanitation approval, the improvements agreement, covenants, bylaws of the property owners' association, certificate of title and design plans.

Some clerk and recorders file the supplementary documents with the final plat, typically the large hanging files. In other counties the plat supplements are filed separately in file drawers. The plat supplements and final plat are cross referenced to direct users to both files. In clerk and recorder offices that microfilm filed documents, the microfilm copies of the plat and supplements usually are filed together,

When the clerk and recorder has filed the final plat, the parcels shown on the plat become new lots on the public record and may be sold by reference to the plat.

STREET DEDICATION

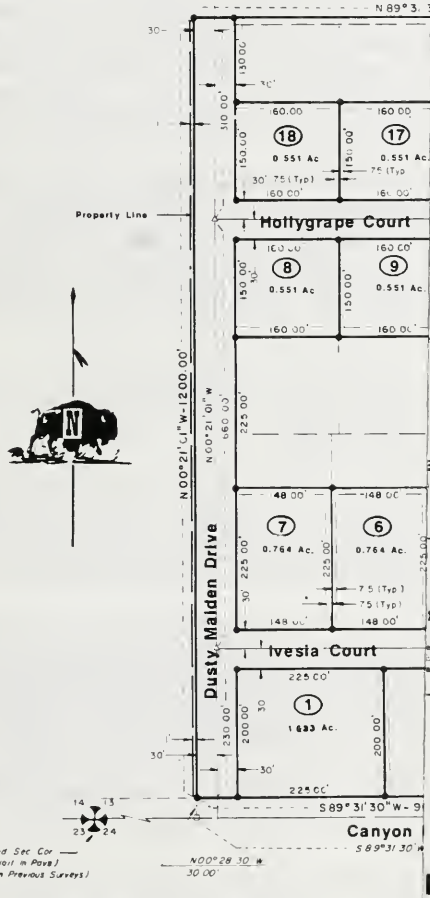
Roads and Streets are to be dedicated to Lewis and Clark County, Montana and are to be constructed to County specifications. Applicant shall petition for, and Lewis and Clark County has agreed to create, a maintenance district for the maintenance and repairs of the subdivision streets.

Lawson N. Love, Owner Date Marsha Love, Owner Date

OPEN AREA/PARKLAND DEDICATION

The open Area/Parkland is dedicated to the PRICKLY PEAR CREEK ESTATES HOMEOWNERS ASSOCIATION for perpetual use for parks.

Lawson N. Love, Owner Date Marsha Love, Owner Date



Basis of Bearings

The Basis of Bearing is the South line of Section 13, said line having a bea
S89°31'30"W.

CERTIFICATE OF DEDICATION

e undersigned property owner, do hereby certify that I have caused to be surveyed,
vided and platted into lots and streets, as shown on the plat hereto annexed, the
wing described land in the County of Lewis & Clark, Montana, to wit:

act of land in the Southeast Quarter of Section 13, Township 10 North, Range 3 West
M., Lewis & Clark County, Montana; more particularly described as follows:

nning at the Southeast Corner of Section 13, T10N, R3W, P.M.M., Lewis and Clark
ty, Montana; thence S89°31'30"W a distance of 1834.66 feet; thence N00°28'30"W
stance of 30.00 feet to a point on the North Right-of-way line of CANYON FERRY
, THE TRUE POINT OF BEGINNING; thence N00°21'01"W a distance of 1200.00 feet;
ce N89°31'30"E a distance of 905.38 feet; thence N00°07'52"W a distance of 118.22
; thence N89°31'30"E a distance of 559.40 feet; thence S00°08'.6"E a distance of
23 feet; thence S89°31'56"W a distance of 559.62 feet; thence S00°07'52"E a
nce of 469.10 feet to a point on the North Right-of-way line of CANYON FERRY
; thence along said Right-of-way, S89°31'30"W a distance of 900.79 feet to
TRUE POINT OF BEGINNING and containing in all 35.786 acres, including all
corded and recorded easements and Right-of-ways.

e shown and designated as PRICKLY PEAR CR: A ESTATES RESIDENTIAL PHASE I SUBDIVISION,
and Clark County, Montana and the land included in all Streets shown on said plat,
so annexed, are hereby granted, donated and dedicated to the use of the public forever.

d this_____day of_____, 19__.

on N. Love, Owner Marsha Love, Owner

cribed and sworn to before me this_____day of_____,19__.

Notary Public for the State of Montana
Residing at_____
My commission expires_____

CERTIFICATE OF SURVEYOR

undersigned Registered Land Surveyor, Montana License No. 7333-S, do hereby certify
he Survey and Platting of PRICKLY PEAR CR: A ESTATES RESIDENTIAL PHASE I SUBDIVISION
ecomplished under my supervision as is shown on the plat and as shown in the Certificate
dication, and that same was made in accordance with the Provisions of the Montana Sub-
on and Platting Act (Title 76 - Chapter 3 - Annotated Code) and the regulations adopted
unt thereto.

Bruce A. Wade, R.L.S.
License No. 7333-S

ribed and swore to before me this_____day of _____. 19__.

Notary Public for the State of Montana
Residing at_____
My commission expires_____

ERTIFICATE OF COUNTY PLANNING

e undersigned, director of the Lewis and Clark County Area Planning Office, do hereby
fy that the plat of PRICKLY PEAR CREEK ESTATES RESIDENTIAL PHASE I SUBDIVISION, Lewis
Clark County, Montana has been submitted for examination and has been reviewed.

Director, Lewis and Clark County
Area Planning Office

ERTIFICATE OF COUNTY TREASURER

County Treasurer of Lewis and Clark County, Montana, do hereby certify that I have
ed the records covering the area included in the accompanying plat of Prickly Pear
Estates Residential Phase I Subdivision, Lewis and Clark County, and find the taxes on
ave been paid for the past five years.

County Treasurer, Lewis and Clark County

FINAL PLAT OF

ICKLY PEAR CREEK ESTATE

esidential Phase I Subdivision

(Lots 1-18)

LEWIS & CLARK COUNTY, MONTANA

STREET DEDICATION

Roads and Streets are to be dedicated to Lewis and Clark County, Montana and are to be constructed to County specifications, Applicant shall petition for, and Lewis and Clark County has agreed to create, a maintenance district for the maintenance and repairs of the subdivision streets.

Lawson N. Lowe, Owner _____ Date _____ Marsha Lowe, Owner _____ Date

OPEN AREA/PARKLAND DEDICATION

The open area/Parkland is dedicated to the PRICKLY PEAR CREEK ESTATES HOMEOWNERS ASSOCIATION for perpetual use for parks.

Lawson N. Lowe, Owner _____ Date _____ Marsha Lowe, Owner _____ Date

NOTATION OF COVENANTS

I, the County Clerk and Recorder of Lewis and Clark County, Montana, do hereby certify that all applicable covenants running with the land encompassed in the plat of Prickly Pear Creek Estates Residential Phase I Subdivision, Lewis and Clark County, Montana, have been recorded by se to Book Number_____ and page number_____ of the Records of Lewis and Clark County, Montana.

_____ Date _____ County Clerk and Recorder Lewis and Clark County, Montana

CERTIFICATE OF COUNTY COMMISSIONERS

State of Montana
County of Lewis and Clark

The County Commission of Lewis and Clark County, Montana, does hereby certify that it has examined this subdivision plat and having found the same to conform to law, approves same and hereby accepts the dedication to public use of any and all lands shown on this plat as being dedicated to such use, this_____day of_____, 19__.

Commissioner _____ Commissioner _____ Commissioner _____

Attest: _____
Clerk and Recorder

_____
County Attorney

CERTIFICATE OF DEDICATION

I, the undersigned property owner, do hereby certify that I have caused to be surveyed, subdivided and platted into lots and streets, as shown on the plat hereto annexed, the following described land in the County of Lewis & Clark, Montana, to wit:

A tract of land to the Southeast Quarter of Section 13, Township 10 North, Range 3 east P.M.M., Lewis & Clark County, Montana; more particularly described as follows:

Beginning at the Southeast Corner of Section 13, T10N, R3W, P.M.M., Lewis and Clark County, Montana; thence S89°31'30"W a distance of 1834.66 feet; thence N00°28'30"W a distance of 30.00 feet to a point on the North Right-of-way line of CANYON FERRY ROAD, THE TRUE POINT OF BEGINNING; thence N00°21'01"W a distance of 1200.00 feet; thence N89°31'30"E a distance of 905.38 feet; thence N00°07'52"W a distance of 118.24 feet; thence N89°31'30"E a distance of 559.40 feet; thence S00°08'48"E a distance of 849.23 feet; thence S89°31'56"W a distance of 599.62 feet; thence S00°07'52"E a distance of 469.10 feet to a point on the North Right-of-way line of CANYON FERRY ROAD; thence along said Right-of-way, S89°31'30"W a distance of 900.79 feet to THE TRUE POINT OF BEGINNING and containing in all 35.786 acres, including all surveyed and recorded easements and Right-of-ways.

To be known and designated as PRICKLY PEAR CREEK ESTATES RESIDENTIAL PHASE I SUBDIVISION, Lewis and Clark County, Montana and the land included in all Streets shown on said plat, hereto annexed, are hereby granted, donated and dedicated to the use of the public forever.

Dated this_____day of_____, 19__.

Lawson N. Lowe, Owner _____ Marsha Lowe, Owner

Subscribed and sworn to before me this_____day of_____,19__.

_____
Notary Public for the State of Montana
Residing at_____
My commission expires_____

CERTIFICATE OF SURVEYOR

I, the undersigned Registered Land Surveyor, Montana License No. 7333-S, do hereby certify that the Survey and Platting of PRICKLY PEAR CREEK ESTATES RESIDENTIAL PHASE I SUBDIVISION was accomplished under my supervision as is shown on the plat and as shown in the Certificate of Dedication, and that same was made in accordance with the Provisions of the Montana Subdivision and Platting Act (Title 76 - Chapter 3 - Annotated Code) and the regulations adopted pursuant thereto.

Date _____ Bruce A. Wade, R.L.S.
License No. 7333-S

Subscribed and sworn to before me this_____day of _____, 19__.

_____
Notary Public for the State of Montana
Residing at_____
My commission expires_____

CERTIFICATE OF COUNTY PLANNING

I, the undersigned, director of the Lewis and Clark County Area Planning Office, do hereby certify that the plat of PRICKLY PEAR CREEK ESTATES RESIDENTIAL PHASE I SUBDIVISION, Lewis and Clark County, Montana has been submitted for examination and has been reviewed.

Date _____ Director, Lewis and Clark County
Area Planning Office

CERTIFICATE OF COUNTY TREASURER

I, the County Treasurer of Lewis and Clark County, Montana, do hereby certify that I have examined the records covering the area included in the accompanying plat of Prickly Pear Creek Estates Residential Phase I Subdivision, Lewis and Clark County, and find the taxes on same have been paid for the past five years.

Date _____ County Treasurer, Lewis and Clark County

DRAINFIELD EASEMENT

Open area as shown on the plat are reserved for drainfield construction by each adjoining lot of site less than one acre. Refer to Section 12 of Covenants for specific details.

Area Summary

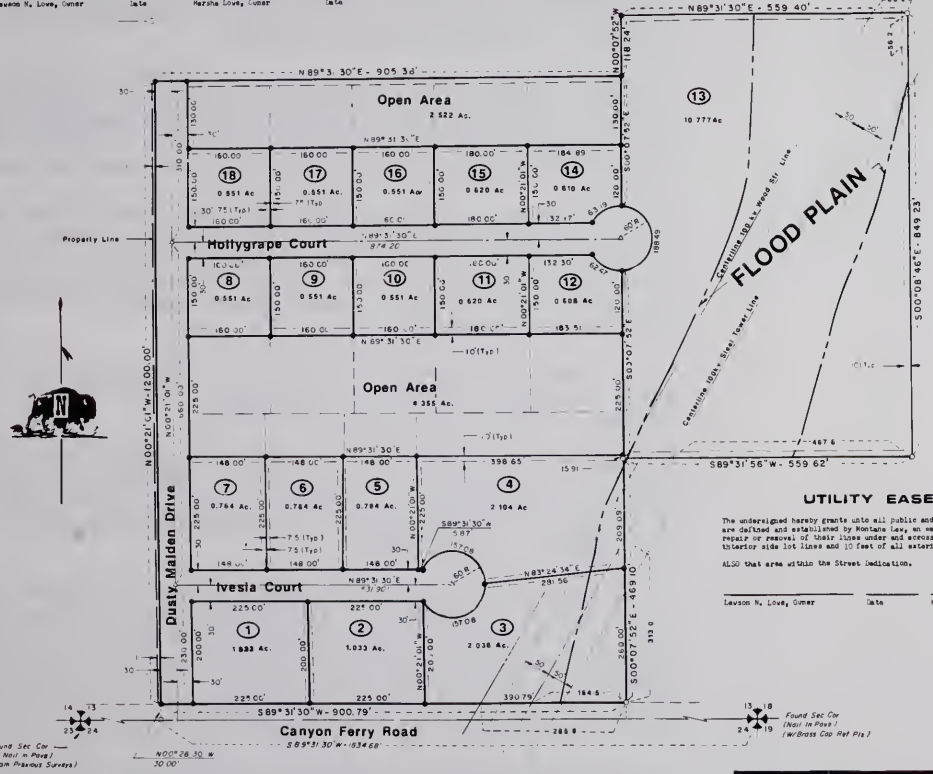
Open Area	6.677 Acres
Street Area	1.[illegible] Acres
Smallest Lot	[illegible] Acres
Largest Lot	10.777 Acres

UTILITY EASEMENTS

The undersigned hereby grants unto all public and private utility companies and cable television, as such are defined and established by Montana Law, an easement for construction, maintenance, repair or removal of their lines under and across the area 7.5 feet either side of all interior side lot lines and 10 feet of all exterior lot lines as shown on the plat.

ALSO that area within the Street Dedication.

Lawson N. Lowe, Owner _____ Date _____ Marsha Lowe, Owner _____ Date



Basis of Bearings

The Basis of Bearing is the South line of Section 13, said line having a bearing of S89°31'30"E.

NOTICE

Wells Wells in the area of this subdivision may be subject to contamination from petroleum products in the groundwater. Potential purchasers of property described hereon should consult with the Water Quality Bureau of the Montana State Department of Health and Environmental Sciences and refer to the Certificate of Subdivision plat approval for this subdivision and should refer to the restrictive covenants for further information regarding this potential problem and measures which might provide protection.

Floodplain Portions of Lots 3,4 and 13 are located within the Floodplain.

PM MONTANA

1/4	SEC	T	R
	13	10N	3W

FINAL PLAT OF

PRICKLY PEAR CREEK ESTATE

Residential Phase I Subdivision

(Lots 1-18)

LEWIS & CLARK COUNTY, MONTANA

D. SPECIAL EMPHASIS ON CERTAIN ASPECTS OF SUBDIVISION REVIEW

1. Policies

Governing bodies and planning boards are continuously faced with discretionary actions during the course of considering subdivisions. To avoid arbitrary and inconsistent decisions, many governing bodies have begun to adopt policies that guide their actions, set precedent for future reviews, and provide a justification for their decisions. The public interest is protected and furthered by policies that help avoid unnecessary public costs to taxpayers, allow more efficient and effective provision of services, and place the costs of services on the direct beneficiaries of those services.

For example, because the MSPA requires that a public hearing be held for major subdivisions the planning board does not need a policy stating that a hearing will be held. But because the statute gives no direction on how the hearing must be conducted the planning board has considerable discretion. It will be advantageous to adopt policies that help assure hearings are properly conducted and allow orderly and fair public testimony.

There are many aspects of subdivision review in which a few clear, thoughtful policies or guidelines can be very valuable to everyone involved. For example, local decisions must be made regarding acceptance of land dedication, cash donation or private land reservation. Decisions must be made on locations of parkland within a subdivision. Maintenance of parkland should be addressed, as should decisions on where and how park fund monies will be spent.

Each of the primary review criteria should be further defined by local policies or guidelines to help local officials in weighing the criteria to reach a determination of whether a subdivision complies with the provisions of the MSPA.

Other aspects of subdivision review for which local policies can be very helpful include improvements guarantees, design and installation of improvements, exemptions and monitoring certificates of survey, standards for content and level of detail in the environmental assessment. The Manual gives suggestions for specific policies for these various aspects of subdivision review.

The general public benefits from explicit policies by knowing in advance what to expect from the subdivision review, and how citizen comments will be most influential. The public also benefits from more efficient and effective provision of public services within the context of overall guidance by policies or plans. Developers benefit by knowing more specifically what is expected and thereby minimizing the risk of the uncertainty. The planner, planning board and governing body find that through more specific policies all parties have similar expectations of the anticipated results of the review process.

The subdivision administrator, in cooperation with the planning board, may want to adopt policies for the function of the planning office. For example, those policies might pertain

to the staff's role in the review process, the content of staff reports, and negotiations with subdividers.

The county clerk and recorder finds many functions of that office dictated by statute, but much discretion still exists. The county clerk and recorder can significantly facilitate orderly operation of that office by enacting appropriate policies dealing with filing and recording of land records, monitoring of certificates of surveys and title transactions, capitalizing on help from the subdivision administrator or sanitarian. The subdivision administrator should work closely with the clerk and recorder.

Policies can be adopted in several forms. Often policies are adopted as part of the local subdivision regulations. In other cases governing bodies can adopt binding policies by resolution under the authority of general powers granted to local government officials. Less rigid, but still effective, guidance can occur from the adoption of operating guidelines which may not carry the regulatory effect of provisions within the subdivision regulations.

Some policies directly affect the success of a project. For example, policies relating to interpretation of the subdivision review criteria, or the legitimate use of exemptions often generate intense interest by the public, and their adoption under the public notice and hearing procedures of the subdivision amendment process is proper. Policies relating to the park requirement and use of park fund monies can be adopted as part of subdivision regulations or as part of the park plan. As amendments to the local subdivision regulations policies must have proper notice and a hearing and be adopted by the governing body as a resolution amending the regulations. The policies usually are included as appendices to the subdivision regulations.

Certain policies may be more appropriately adopted as local government policies separate from the subdivision regulations. Appropriate examples include policies guiding: the clerk and recorder's filing and recording of land records, the subdivision administrator's role in the review process, and the sanitarian's coordination with the subdivision administrator. Evasion criteria can be adopted outside of subdivision regulation amendment under the various authorities provided by Attorney General Opinions and Supreme court decision [see the Model Evasion Criteria in Appendix F].

A third alternative for local governments is to adopt policies as guidelines. These policies are less binding and offer more flexibility. Local officials should be cautioned that frequent deviations from the policy guidelines will quickly erode their value as a tool giving consistent direction. Policies governing the conduct of public hearings and the content of staff reports could be adopted as guidelines.

Examples of various policy statements appear in Appendix J.

2. Review Criteria

The MSPA requires that the local government address the review criteria specified in Section 76-3-608, MCA:

a. The effects on agriculture, local services, the natural environment, wildlife and wildlife habitat, the public health and safety;
b. Compliance with the survey requirements of the MSPA;
c. Compliance with local subdivision regulations;
d. Compliance with local subdivision review procedures;
e. The provision of easements for the location and installation of utilities;
f. The provision of legal and physical access to each parcel within the subdivision and the required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

The governing body must issue a written finding of fact that weighs the review criteria to determine whether a subdivision complies with the provisions of the MSPA. Because subdivision approval is contingent on this determination, the criteria must be taken seriously.

Two aspects of this requirement deserve special attention. First, the written finding is to be a finding of fact, implying that local government personnel must make every attempt to respond with an assessment of the expected actual effects of the subdivision. The second aspect of the requirement is that local officials must "weigh" each criterion as part of the approval process to determine whether the subdivision complies with the provisions of the MSPA.

The 5 primary criteria – effects on agriculture, local services, natural environment, wildlife and wildlife habitat, and public health and safety – are general and can create some confusion or uncertainty, which may cause difficulties for local officials, subdividers, and the public. The manner in which a local government handles the review criteria can affect the acceptability of the subdivision review process in the eyes of the public and subdividers.

Local government can minimize the problems of generality or vagueness by developing specific standards for evaluating a subdivision under the subdivision review criteria. The first set of standards would address the aspect of preparing a finding of fact – a means of ensuring consistency in determining what are the "facts" surrounding a subdivision. The second set are local standards or thresholds for determining when the "weighed" effects of a subdivision are acceptable or unacceptable with regard to complying with the provisions of the MSPA. Establishing these thresholds is advantageous in order to assure consistency in approving, conditionally approving or disapproving a subdivision. Examples of thresholds where the impacts are unacceptable might include (1) converting 80 acres of SCS Class II farmland, under the criterion "effect on agriculture," or (2) adding four new classrooms, under "effects on local services."

3. Findings of Fact

First, projecting the effects of a proposed subdivision is inexact at best, but certain procedures can make the evaluation as "factual" as possible. Local officials should determine what factual information under each criterion pertains to proper consideration of a subdivision.

Effects on Agriculture

Interpreting the effects on agriculture simply to mean the loss of agricultural land should be approached with caution by a local government, because preserving agricultural land must be a local goal, and such a goal should be justified as important to the local community (e.g., the economic importance of agricultural production to the local jurisdiction).

Other effects on agriculture that are more easily expressed include: (a) disruption or contamination of irrigation facilities or water supplies; (b) interference with livestock grazing, feeding, watering or moving; (c) potential filing of nuisance suits for fertilizing, cattle movements or straying, aerial spraying, excess irrigation runoff water, or spread of noxious weeds; (d) problems of fence maintenance and repair; (e) increased traffic on rural and farm roads; (f) increased trespass; (g) dog problems; and (h) liability.

Effects on Local Services

The effects on local services can take time to properly analyze. The expected number of new elementary and high school students should be projected and allocated to a particular school. Projections should be made for new water and sewer hookups, garbage collection stops, miles or linear feet of new streets, need for additional public street improvements and street maintenance.

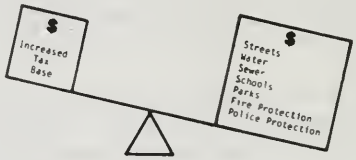
Effects on local services can also mean additional facilities for fire protection, as well as additional time or personnel for police or sheriff departments, and the animal control department. Existing special districts, such as SID's, RID's, county water or sewer districts, or rural fire districts may provide services which might be affected by a new subdivision. Often new special districts must be formed to provide certain services, especially in unincorporated areas where most community services must be provided by special district. Coordination with special districts will greatly help in preparing a finding of fact.

The magnitude of the effect on each local service should be determined based on a reasonable multiplier from the number of expected new families served by the proposed subdivision (e.g., 1.7 school age children per household). Local officials also should evaluate whether a proposed subdivision will bring in new people and thus place additional pressures on a service, or whether part of the existing

population within the jurisdiction will simply relocate, thereby redistributing the effects on local services (e.g., the number of school children in a particular school, or needs for water and sewer, police, fire, garbage services).

The subdivision administrator may be satisfied by simply identifying the need for expansion or extension of capital facilities. At the other end of the spectrum is conducting a formal fiscal impact analysis [Appendix N, Fiscal Impact Analysis, offers one approach to a more detailed evaluation of the effects on services.]

Residential subdivisions rarely generate enough additional revenues to offset the added public costs of providing services to the development. Commercial and industrial developments usually pay more in additional taxes than the cost of added public services.



New development adds to the property tax base, but also adds to public costs.

Costs are one side of the local services equation, and revenues are the other. Increases in user fees and tax revenues generated by a proposed subdivision can be readily projected. The current taxable valuation of the land proposed for subdivision can be obtained from the county assessor or county appraiser. Usually the land is in an agricultural classification. Upon the completion of the subdivision, the land typically will be classified as suburban tracts or urban lots, depending on whether the subdivision is located outside municipal boundaries or within city limits. The county assessor can explain how to estimate the increase in taxable value and, therefore, the probable increase in property taxes of the subdivision.

A more rigorous approach is to do a formal impact analysis [see the Appendix N, Fiscal Impact Analysis, for more detail on determining the effects on services].

Effects on the Natural Environment

Determining the effects on the natural environment usually involves a technical evaluation, and most subdivision administrators must rely on the comments or assessments of professionals in each field – soils, surface and ground water, vegetative cover, and geology. Agencies such as the U.S. Soil Conservation Service (SCS), Montana Department of Natural Resources and Conservation, Montana Bureau of Mines and Geology, Department of Health and Environmental

Sciences, Fish, Wildlife and Parks, and Montana Environmental Quality Council can provide studies or reports on local natural features, or can sometimes make on-site inspections to determine what impacts a subdivision would have on the natural environment.

Effects on Wildlife and Wildlife Habitat

As with the natural environment, effects on wildlife and wildlife habitat is best determined by biologists within the Department of Fish, Wildlife and Parks or associated with a university. Field personnel are located throughout Montana and usually can provide definitive statements of the value of an area for wildlife and how a proposed subdivision might affect those wildlife values.

Effects on the Public Health and Safety

The effects on public health and safety typically focus on hazards associated with water contamination, slope failure, flooding, water depletion, earthquakes, powerlines, natural gas lines, industrial activities, and vehicular traffic. Again, assistance can be obtained by contacting personnel in state and federal agencies or private utilities: the Department of Natural Resources and Conservation, DHES, Bureau of Mines and Geology, U.S. Soil Conservation Service, the power company and telephone company.

4. Weighing the Criteria

Even more difficult than identifying the "factual" information surrounding a proposed subdivision is the setting of standards under each criterion by which a subdivision is weighed. Attempting to establish the threshold at which a subdivision is considered to have an unacceptable impact can be particularly challenging.

It is one thing to project that a subdivision will have a certain effect on agriculture, local services, taxation, wildlife or public health, but it is entirely different to determine that the level of impact will reach a point at which the subdivision should be disapproved. Often local officials place conditions on approval that will help reduce the adverse impacts.

It is particularly important that the local government establish thresholds under each of the criteria to provide more detailed guidance in denying or approving subdivisions based on the five primary review criteria.

As part of the process of weighing a proposed subdivision against the review criteria, a local government can establish "go or no go" thresholds under some or all of the criteria. For example, a subdivision proposed in an area subject to periodic flooding might be denied under the criterion for "effects on public health and safety."

Often local officials will not consider circumstances under any one criterion sufficient to reach a finding that a proposed subdivision should not be approved under the review criteria. But conditions under a number of the criteria may create a total cumulative impact that would be sufficient basis for denying approval.

In whatever manner the local government chooses to use the five primary review criteria in subdivision approval or disapproval, the basis for approval or disapproval must consider 1) reasonableness, (2) a relation to local conditions and circumstances, (3) a relation to locally established land use goals.

As a general (and therefore uncertain) guideline, courts usually will not allow denial of a development simply because local services must be expanded or extended. However, where a local unit of government has adopted a carefully developed plan for expansion of its services over a period of time, courts may allow local officials to deny and approve subdivisions in order to implement the plan and maintain their schedule of expanding services.

Disapproving subdivisions that convert agricultural land might be upheld if the local plans and policies show that preservation of agricultural land is vital to the community (economically or otherwise). Likewise, approving or disapproving subdivisions based on diminution of wildlife habitat should reflect carefully articulated policy statements regarding each of those subjects, and show the relationship between each policy statement and the local public benefit.

Thoughtful comprehensive planning can greatly aid in weighing the primary review criteria. It can provide the background information and the community objectives that allow ready consideration of such difficult criteria as effects on agriculture, local services, or wildlife.

Determining whether a proposed subdivision meets the other review criteria is much easier. The requirements for surveying and for preparing a subdivision plat are specifically prescribed in the statute and in the administrative rules adopted by the Department of Commerce. The design standards of local subdivision regulations are usually specific or dimensional criteria that can be readily measured. Likewise, the review procedures in local subdivision regulations are usually clear and easily understood.

The provision of easements for locating and installing utilities is a matter of examining the plat to determine whether easements are provided to ensure that utility lines can be extended into the subdivision and to each lot within the subdivision. Representatives of the appropriate electric power, telephone, and cable television companies should review

the plat to determine that easements are wide enough and located to allow ready installation and maintenance of the utility facilities.

"Legal access" is readily provided where a proposed subdivision will adjoin a public road. If a subdivision does not adjoin a public road, the subdivider must provide copies of executed easements or other agreements allowing permanent access across properties from a public road to the subdivision. An easement or other legal agreement must be provided for each property that must be crossed. Documents granting the easements should be reviewed by the city or county attorney for adequacy. In situations where it may be difficult to identify the boundaries of an easement on the ground, the governing body may wish to require road easements to be surveyed. "Physical access" is usually considered to be a road that meets the standards of the local subdivision regulations.

5. Improvements Agreement; Guarantees

One of the most important public benefits of subdivision review is the assurance that necessary improvements are properly designed and constructed. Because properly installed improvements can save costs to the public, local government units should enforce procedures to ensure that the required improvements in proposed subdivisions are correctly constructed.

Subdividers can either install the required improvements before the final plat is filed, or delay installation by committing, in a written improvements agreement, to install the improvements by a certain date. Section 76-3-507,MCA, authorizes local governments to require a developer to secure the improvements agreement with a financial or other form of guarantee. The financial guarantee should be approved by the governing body and be in a form that allows the unit of government to draw funds from the financial instrument to install the improvements in the event the subdivider fails to meet his obligation.

Improvements agreements are contracts between the subdivider and the local government that assure the subdivider will install the improvements required under the review process by a specified date. The purposes of an improvements agreement are two-fold: to ensure that adequate improvements are provided and to protect the governing body and the public from the costs where a subdivider fails to install required improvements.

A subdivision improvements agreement that protects the interest of the local government contains a number of provisions:

- A commitment to complete the improvements in compliance with specified standards and specifications by an established date;
- The projected costs of the improvements required by the governing body;
- A financial security of a value equal to the approved projected costs of the improvements (including an inflation factor), or another type of guarantee ensuring

that the improvements will be properly installed by the specified date;

- A warranty against defects in or failure of the improvements for a period of one year from the date of certification of the last completed improvement.

Financial securities create costs for the subdivider, and typically those costs are passed on to the lot buyer and home builder. By allowing a number of security options from which subdividers can choose a practical financial guarantee, local government can ensure that small developers are not precluded and housing costs are not significantly increased.

The financial securities commonly used to back improvements guarantees include surety bonds, letters of credit, and deposits of cash or property in an escrow account. Other guarantees include commitments to create rural or special improvement districts, or agreements that the subdivision will be developed in sequential phases, with the final plat approval of the second and subsequent phases contingent upon the prior completion of improvements in the earlier phases.

The most practical financial guarantee for both the governing body and the subdivider is an irrevocable letter of credit. A letter of credit can be obtained readily from banks and other financial institutions. When properly worded, it can provide an assurance to the local government that funds will be made available to pay for improvements that are not provided by the subdivider as required. [Recommended language for a letter of credit is provided in Appendix L.]

The financial security must be in an amount equal to the costs of completing the required improvements. Depending on the length of time allowed the subdivider to complete the improvements, an additional margin above current costs might be required to cover inflation. To ensure that the costs of improvements will be covered by the financial security, the local government should have the plans and specifications reviewed by a registered engineer (other than the subdivider's engineer) to estimate the costs of completing the improvements, and to ensure that the improvements will be designed and constructed to acceptable standards.

Where a developer offers his own money or collateral as a financial guarantee, the local government should require that the security be placed with a third party, preferably a bank or other financial institution. A third party assures that the collateral serves as the guarantee and facilitates making the security available to the local government should the subdivider default.

Local subdivision regulations assure that improvements are completed properly by providing for inspection by a registered engineer. Local regulations also should provide for a certification of both the proper completion of the improvements and the fact that the improvements are clear of any liens or encumbrances. The cost of inspection can be placed on the subdivider.

By requiring a warranty period (usually one year) following completion of last of the improvements, a local government can protect itself against the costs of repairing or reconstructing improvements that fail or develop defects. Any financial security should be drafted to remain in full force throughout the completion period and the warranty period.

When all, or a portion, of the improvements have been certified as properly completed, and all other requirements of local regulations have been met, the local government may release the subdivider from the improvements guarantee, or any portion that corresponds to the value of the completed improvements.

In addition to drafting improvement agreements and guarantees with practical time periods and deadlines, local officials should keep track as those deadlines approach in order to give themselves adequate time to properly inspect improvements and, where necessary, prepare the paperwork needed to draw on the financial security. Appendix H of the Model presents a suggested draft of an improvements agreement. The following description of the available improvements guarantees outlines the advantages and disadvantages of each.

Surety Bond

The surety bond is a three-party instrument in which the subdivider pays a fee to the lender (surety) in return for the surety's guarantee to the local government that the subdivision improvements will be completed. The amount of the fee depends on two conditions: the developer's financial condition, and his track record in meeting past financial commitments.

Although a surety bond may appear to be a simple type of security, it can be difficult for a developer to obtain, and often it is very costly. Surety bonds are drafted to ensure protection for the lender. The lender often requires the developer, any partners, and even spouses to indemnify (guarantee against loss) the lending company.

Often the surety bond is written to provide the lender with options of providing the developer funds to complete the subdivision improvements, hiring another contractor, or providing the funds to the local government.

The surety bond contains the key provisions of the subdivision improvements agreement: the improvements required, the conditions of default, the cost of constructing the improvements and the rights and obligations of the local government. Frequently, in the event of default by the developer, the local government finds that the lender refuses to compensate the local government, claiming that one or more of the provisions have not been met.

In cases where the lender raises objections to disbursing the funds to the local government local officials must file suit to have the funds released from the surety bond.

Typically, the local government must establish in a lawsuit that the developer in fact defaulted on the subdivision improvements agreement and that the local government was damaged by the failure to complete the improvements. The lender can argue that where the developer did not sell any lots or complete the subdivision that the local government suffered no damages and therefore is not entitled to funding. Lenders also raise other arguments, such as the fact that the expiration date has passed, that the bond payment constitutes a penalty, or that the government has expressly or by implication accepted the improvements. Because of the many potential difficulties for both the local government and the developer, local officials may choose to discourage use of a surety bond, especially since more practical guarantees are available.

Irrevocable Letter of Credit

A letter of credit is a direct means by which a lender backs a developer's commitment to complete required improvements. In a security by letter of credit, three separate agreements are executed. The first is the subdivision improvements agreement between the developer and the local government; the second is an agreement between the developer and the lender to guarantee the developer's commitment; the third (the letter of credit) is an agreement between the lender and the local government in which the lender agrees to compensate the government in case of default by the developer.

Unlike a surety bond, the letter of credit does not incorporate the terms of the underlying subdivision improvements agreement. The local government is only required to affirm that default has occurred and is not obligated to prove actual damages or document financial loss. Under the letter of credit, the local government need only submit a sight draft (a draft that must be paid upon presentation, or "at sight") demanding payment and an affidavit affirming default. The lender is obligated to make the payment to the local government. Therefore the local government rarely must take legal action to receive compensation.

The letter of credit is a very effective means for a developer to secure his commitment to construct required improvements. Usually, a developer can readily obtain a letter of credit, and at much less expense than a surety bond. Typically, the lender issues the letter of credit on the account of the developer (in favor of the local government). If the lender must make a payment to the government, the amount of the payment is added to the developer's loan, which usually is secured by a first mortgage or deed of trust on the property.

Cash Escrow

In its simplest form, a cash escrow consists of the developer's deposit of a specified amount of money with an escrow agent. The amount should equal the estimated cost of the improvements. If the improvements are completed satisfactorily, the escrow agent releases the funds to the developer. If the developer defaults the agent releases the funds to the local government.

Depositing cash into an escrow account creates the same difficulty for the developer as constructing the improvements before selling any lots. In fact, double-funding occurs because the developer still must pay for constructing the improvements while an equivalent amount of cash remains in escrow. Some of the burden of double-funding can be mitigated by periodic release of portions of the funds in escrow as construction progresses. The local government must be careful not to release too great a portion of the funds, thereby creating a shortage in the escrow to cover the cost of the remaining uncompleted improvements.

Where the developer has borrowed money to place in escrow, the lender may be more insistent that the local government make frequent inspections of completed improvements and releases of funds in escrow. Frequent releases increase cash flow and minimize double-funding for the developer and reduce the risk of the lender.

Local officials need to assure that the escrow arrangement truly serves as a financial security, and that under the terms of the escrow the local government can readily obtain the funds needed to complete the improvements. Typical "boiler plate" language that banks use for escrow accounts is not intended to secure a performance, so for purposes of securing a subdivision improvements agreement provisions of guarantee must be incorporated into the escrow agreement. A sound escrow security must have terms similar to those of the letter of credit to ensure the public interest will be protected.

Property Escrow

A property escrow functions much the same as a cash escrow. Rather than cash, property such as stocks, bonds, equipment and real property are placed in escrow. If the developer defaults, the escrow agent releases the property to the local government for sale to raise the funds needed to install the improvements.

The same caution is required with property escrow as with cash escrow. The terms of the escrow account should provide that (1) the property is controlled by the escrow agent, (2) the agent must release the property to the local government in the event of default, and (3) the local government need only affirm that default has occurred.

One difficulty of a property escrow is determining the value of the property. Many stocks and bonds fluctuate in market value. Also, real and personal property must be carefully appraised to determine its market value in the first place, and its market value can change over several years.

Another problem is that property often can be difficult to liquidate into cash. The local government may find that considerable time and effort is needed to sell property at or near its appraised value. Often the only collateral a smaller or undercapitalized developer will only have is the property he proposes for development. This option is not recommended because that property very likely will be subject to prior liens, and will have little equity to secure the improvements agreement.

The local government should insist that it have a first lien on the property. In that case the lender likely will require that the government make frequent periodic releases of portions of the property. Where lots in the development are proposed for release, the local government must assure that lots of sufficient value remain in escrow to cover the remaining cost of completing the improvements. Local officials must consider such factors as the location and desirability of lots remaining (typically the most desirable lots are sold first), whether lots are scattered or in a block, and whether a single buyer would be interested in the remaining lots or if they must be sold piecemeal.

There are enough potential problems with property escrows that a local government may not want to allow their use as a security. A possible exception could be granted when the subdivider offers property that is of stable value and readily liquidated into cash. Most bonds, for example, are fairly stable in value and can be liquidated easily.

Special Improvement Districts; Rural Improvement Districts

Another means of guaranteeing that improvements will be installed is an agreement between the subdivider and the local government that improvements will be financed through a Special Improvement District if located within a municipality, or a Rural Improvement District if located in an unincorporated area.

As a condition of subdivision approval, the subdivider commits to creating an improvement district to issue bonds covering the cost of the required improvements. By selling the bonds the subdivider raises the funds to install the improvements at the beginning of the project. The subdivider is able to shift the cost of retiring the bonds to subsequent lot buyers within the district.

A subdivision improvements agreement depending on formation of an improvement district should contain at least two important provisions: (1) that no lots will be sold or leased before the improvement district is created and the improvements completed, and (2) that the subdivider and subsequent lot owners waive the right to protest or petition against creation of the improvement district.

Local officials should be discouraged from using rural or special improvement districts as improvement guarantees, especially since other more practical means of guaranteeing improvements are available. Improvement districts create considerable administrative work for the unit of local government. Where assessments to amortize the bonds fall short of the amount needed, the local government (i.e., all taxpayers in the county or municipality) is responsible to pay the principal and interest due on the bonds. A number of local governments have faced a high rate of delinquencies in assessment payments, and to date the legislature has not given local government sufficient power or leverage to overcome delinquencies.

Phased Development (Sequential Approval)

Sequential approval of phases of a development is not a financial security but is a means of ensuring that the subdivider installs improvements. Sequential approval involves dividing a large development into smaller segments or phases and final plat approval is given to one phase at a time. Final plat approval of subsequent phases is contingent on installation of the improvements in the previous phases.

The guarantee arises through the requirement that the second or subsequent phases will not be approved until the improvements in the earlier phases are properly installed. The technique is most effective in serving as a guarantee when improvements will be constructed where the development is large enough to divide into a number of smaller phases.

The developer benefits from this method because there is no cost of a financial guarantee. For this reason sequential approval may seem ideal for small developers. In practice, however, small developers are rarely involved in large enough developments to break into feasible small phases. As developments become large enough to effectively protect the local government small developers become less able to participate.

Each phase of the overall development becomes, in effect, an independent "mini-subdivision." By developing in small phases the developer often loses the economies of scale associated with constructing larger scale improvements. Another shortcoming is that some improvements such as treatment plants do not lend themselves to phased construction.

A disadvantage for the local government is that there is no third party to compensate the government in the event of default. A default at any phase probably will result in a loss to the local government, and it has no recourse for financial recovery.

Improvement Completion Agreement

A new concept for guaranteeing subdivision improvements is the Improvement Completion Agreement. It is a 3-party agreement in which the lender commits to lend an amount of money to the developer for constructing improvements, and the developer agrees to use the funds to complete the improvements. The security arises from the lender's commitment to the local government to continue to fund construction of the improvements even if the developer defaults.

To be effective the lender should be a principal financier of the development. Typically, the lots in the subdivision constitute a major portion of the collateral for the development loan, and thus, the development lender has a financial stake in the completion and marketing of the development.

The Improvements Completion Agreement is an attempt to incorporate the advantages of the other forms of security. It can:

- save the developer the costs of paying bond premiums or obtaining a letter of credit;
- eliminate likely litigation associated with surety bonds;
- offer flexibility that is not available in a letter of credit;
- give a lender economic incentive to ensure completion of improvements;
- save the local government the administrative and management burden of installing the improvements.

Section 76-3-507, MCA, only mentions bonding as a specific improvement guarantee, but as with the other securities, the Improvement Completion Agreement is authorized by the language "... or other reasonable security,..." However, the Model Subdivision Regulations and nearly all local subdivision regulations specify the permitted forms of security. Because improvements completion agreements are not specifically listed, most local regulations must be amended if this security is to be used.

As with other security agreements, the key to protecting the local government interest under an improvements completion agreement will be carefully drafted provisions:

- that the required improvements must be completed to specified standards by a certain date;
- in the event of default, the lender will disburse no further funds to the developer;
- in the event of default, the lender uses funds to complete the improvements, or disburses the funds to the local government to be used for completing the improvements;

The lender has a financial stake in the subdivision (attaining the development value of the lots that serve as collateral for the development loan; or repayment of the development loan). Therefore the lender is motivated to ensure the marketability of the lots through properly installed improvements. This security agreement is advantageous to the lender in that it can keep control of the funds and ensure that expenditure is toward completion of the improvements.

The local government benefits because of the high probability that the improvements actually will be installed, and usually without the added burden of actually installing the improvements. Also, because the lender benefits financially from completion of the improvements there is little likelihood that the need for litigation will arise.

The developer derives benefits over other forms of security. The arrangement eliminates the delay and costs associated with surety bonds and letters of credit. The developer can avoid the problems of substantial collateral usually needed for escrow accounts and surety bonds. In addition, developers can finance and secure the entire development package from one lender.

ALTERNATIVES FOR GUARANTEEING CONSTRUCTION OF IMPROVEMENTS

MEANS	HOW IT WORKS	BENEFITS	PROBLEMS
IRREVOCABLE LETTER OF CREDIT			
An agreement between local gov't and lender	Lender agrees to provide payment to local gov't in event of default; Upon default, local gov't presents affidavit of default and sight draft to lender; lender makes payment to local gov't to complete improvements.	▪ direct means for local gov't to obtain compensation ▪ relatively inexpensive for subdivider ▪ local gov't need not prove default or terms to receive compensation ▪ local gov't rarely must file suit for compensation	▪ relatively inflexible ▪ usually cannot allocate responsibilities of various parties
SURETY BOND			
A 3-party agreement between the developer, local gov't and lender	Developer pays a fee for lender's promise to guarantee completion of improvements; upon default, local gov't calls on lender to provide for completion of improvements.	▪ upon default lender provides local gov't with compensation ▪ can allocate responsibilities among parties	▪ often costly for subdivider ▪ smaller subdividers often precluded by credit position or lack of cash ▪ local gov't must prove default ▪ local gov't often must file suit
CASH/PROPERTY ESCROW			
	Subdivider places cash or property in escrow; if default, escrow agent releases cash or property to local gov't for completion of improvements.	▪ subdivider has flexibility to use available cash or property as security ▪ can be convenient if cash or property available	▪ small subdividers usually lack sufficient collateral ▪ local gov't must try to market property to obtain cash ▪ market values of property can fluctuate over time; ▪ need careful appraisal of property
SPECIAL IMPROVEMENT DISTRICT; RURAL IMPROVEMENT DISTRICT			
A district authorized to assess payments on properties to retire bonds	Subdivider forms an improvement district to issue a bond; proceeds from bond sale raises funds to complete improvements; bond is retired from annual assessments on lots in district	▪ local gov't assured that improvements are constructed early in project	▪ default on assessment payments becoming common; local gov't incurs liability for bond payments
PHASED DEVELOPMENT			
Portions of development are approved in several phases	Approval of subsequent phases is contingent on completion of improvements in prior phases	▪ subdivider can sell some lots and generate cash flow ▪ no additional costs to subdivider for security	▪ certain improvements (e.g.,treatment plants) cannot be built in phases ▪ phased completion may preclude economies of scale ▪ no 3rd party to offer local gov't financial relief
IMPROVEMENTS COMPLETION AGREEMENT			
A 3-party contract, lender lends funds to developer who commits to spend on installing improvements	Upon default by subdivider, lender commits to fund improvements from subdivider's development loan.	▪ less cost and delay for subdivider ▪ litigation unlikely	▪ local reg's must be amended to permit use of this security

6. Environmental Assessment

The Montana Subdivision and Platting Act sets general requirements for contents of the Environmental Assessment (Section 76-3-603, MCA): descriptions of natural environmental features including surface and ground waters, topography, vegetation, wildlife, and soils and suitability of soils for development; and a community impact report describing the subdivision's effects on local schools and busing, roads and maintenance, water, sewer, solid waste, fire and police protection.

The governing body is authorized to outline more specific information that it requires as part of the Environmental Assessment.

The MSPA does not set any standard for detail or thoroughness of the information provided by the subdivider. Therefore, local officials should establish policies regarding: (1) the information that will be required, (2) the level of detail that is necessary for review of the subdivision (yet is reasonably available to the subdivider), and (3) the format that facilitates the use of the information by the planner, planning board and local officials.

Appendix D of the Model offers suggestions for the specific information that a local government might require. To obtain the suggested data, technical (and sometimes expensive) field investigations are required. The Model assumes that by contacting certain agencies the subdivider can readily obtain most of the required data. A subdivider need not retain a consultant to prepare an Environmental Assessment that would meet the requirements of the Model, but a person proposing a large subdivision may find that hiring a consultant would be worth the expense.

The most important consideration for a unit of local government is to require those data, and only those data, that will contribute to a proper review of a proposed subdivision. At a minimum, the Environmental Assessment should provide information that allows evaluation of the subdivision in relation to (1) the primary review criteria, (2) compliance with the comprehensive plan (if a local jurisdiction has a plan and requires subdivisions to comply), (3) the general and design standards of the local subdivision regulations and (4) mention of any natural or environmental feature that could require mitigation to ensure public health or safety.

The subdivision administrator should develop, with the concurrence of the planning board and elected officials, a description of the detail and format in which the information can be presented. Because the level of detail is qualitative, specifying standards can be difficult. One practical method of setting standards for adequacy of data in the Environmental Assessment is to find or create a completed Environmental Assessment that meets the expectations of the local government and to provide that Assessment as a model for subdividers. The subdivision administrator probably will need to rewrite parts of the selected Assessment to revise it into an acceptable model. [See Appendix G, for a sample Environmental Assessment.]

Other means of setting standards for adequacy include providing a range or a minimum of mapping scales where maps are an appropriate means of presenting data. Standards also can indicate the types of units for expressing data (e.g., number of new school pupils, average daily traffic volume, increased cost for road maintenance).

Because the subdivider provides the Environmental Assessment, the subdivision administrator must find a reliable means of checking the data provided. The information provided in the Assessment may not give a true picture of the facts surrounding a proposed subdivision for a variety of reasons, including the subdivider's: (1) desire to maximize (or overstate) the positive attributes of the subdivision, (2) indifference toward the benefit of the Environmental Assessment, (3) perception that there is insufficient time to be thorough, and (4) difficulty in obtaining information.

The subdivision administrator for the local government needs to make an on-site inspection, check available studies or reports, and contact agency personnel as means to quickly check the accuracy of the information provided in the Environmental Assessment.

7. Park Requirement

The MSPA contains a general provision that a subdivider meet a statutory park requirement (the exceptions are explained below). The provision requires dedication of land equivalent to 1/9 of the total area of lots that are five acres or less, and 1/12 of the total area of lots that are greater than five but less than 10 acres in size. No park land is required for lots larger than 10 acres. The park requirement may be met by dedicating park land to the local government, reserving private land in perpetuity as park land, or donating cash in lieu of land to the local government park fund. When cash is donated, the amount shall be based on the market value of the undivided, unimproved land.

Determining the amount of land necessary to meet the park requirement is a straight-forward process. A properly drafted preliminary plat will show the acreage of each lot within the proposed subdivision. From the information on sizes of lots, the subdivision administrator can determine the park requirement: the total of 1/9 the combined area of all lots five acres or less plus 1/12 of the total area of the combined area of all lots greater than five acres but less than 10.

The governing body may completely waive the park requirement where all of the lots are five acres or greater in size and the subdivider enters into a covenant running with the land that the lots will not be further subdivided and that only single family dwellings will be built on the lots.

The subdivider need not contribute land or cash in lieu where a subdivision is part of a larger tract developed under single ownership and sufficient park land has been dedicated from the overall development to satisfy the park requirement for the entire tract.

At the discretion of the governing body, the subdivider may meet the park requirement by permanently reserving a sufficient amount of private land to meet the park requirement:

- when the subdivider agrees to create a property owners' association for the subdivision and deed sufficient park land to the association for permanent use as a park;
- where the proposed subdivision provides for a planned unit development with a sufficient amount of park land permanently reserved; or
- for a subdivision created by rent or lease where the subdivider agrees to develop and maintain a sufficient amount of park or playground area for the common use of the residents.

In addition to deciding appropriate means of meeting the park requirement, governing officials have broad discretion to determine the location of park land and to set requirements for future park land maintenance responsibilities, including formation of maintenance districts if the land is dedicated to the public.

Establishing basic guidelines and policies can give consistency to the exercise of local officials' discretionary powers. Those policies will help everyone involved in the review process, especially subdividers, know what is expected in meeting the park requirement. Appendix J of this Manual sets out suggested park policies that could be included in local subdivision regulations.

Because the statute requires that the cash value be based on the market value of the unsubdivided, unimproved land, cash-in-lieu seldom equals the value of dedicated land. Thus, the cash received in lieu of land usually will not buy an equivalent amount of park land. Therefore, in deciding whether to accept dedicated land or cash-in-lieu, a local government may want to adopt a policy of giving first priority to accepting dedicated park land rather than accepting cash. In this case, a minimum amount of park land to be accepted should be determined to ensure that the area is useable as a park or playground.

Cash In Lieu

Cash-in-lieu, however, is appropriate in a number of cases, such as:

- the size of the park dedication would be too small to serve as a useful park or playground area, or it could not be efficiently maintained;
- no suitable area for a park exists within the subdivision;
- sufficient public park and playground areas exist within the vicinity of the subdivision that will adequately serve the needs of the residents of the subdivision;
- land can be acquired and developed near the proposed subdivision that is preferable for park land or will enhance an existing park, and it will serve the residents of the subdivision;
- a portion of dedicated park land can be initially developed using cash-in-lieu.

Where cash is accepted in lieu of land, it is important to understand that the unsubdivided, unimproved value of land does not necessarily mean its market value as agricultural land. The unsubdivided, unimproved land may have a real estate appraisal value as developable land, which almost always is higher than that of agricultural land. Assuming that a developer recently bought property to subdivide and paid fair market value, the purchase price per acre would be an appropriate rate at which the subdivider would pay cash-in-lieu.

The local regulations should provide for an appraisal of the value of the park land by a qualified appraiser and the cost of the appraisal can be placed on the subdivider. If the land was purchased within one year of preliminary plat submittal, the purchase price of the land might be used to establish the amount of cash in lieu. This figure is usually reviewed by the planning board or planning staff.

Section 76-3-606 (2), MCA, stipulates that when cash in lieu of land is accepted, the cash must be placed in a park fund. Those funds can only be spent for purchase of park land or initial development of existing parks or playgrounds. The purpose of the statutory provision is to assure that the cash is used to acquire park land and not to subsidize local governments' routine park maintenance and operation responsibilities. Local governments should set up a separate account to receive and expend cash-in-lieu funds. By separating that account from other park and recreation fund accounts, the records can show that the cash-in-lieu monies were expended for their proper purpose. The Model, on page 38, recommends a provision that requires the amount of cash-in-lieu be shown on the face of the final plat.

The term "initial development" is somewhat subject to interpretation, and therefore is an appropriate area for written guidelines or policies. Typically, initial development includes any grading, leveling, drainage facilities or other site preparation costs. It includes planting grass, trees and other vegetation, construction or purchase of recreation facilities, walkways, parking areas and other facilities that are necessary to develop a tract into a usable park or playground area.

Within the limitations of park acquisition and initial development, governing bodies have tremendous discretion in how those funds are spent. The location, capacity, type of park or recreation activities, and ability to enhance existing parks all are examples of issues that will confront governing officials when cash in lieu funds are spent.

An adopted jurisdiction-wide park plan offers the best guidance for expending park funds. For local governments that do not have park plans, the local officials would benefit by adopting policies for acquisition and development of park lands. Residents of a subdivision where cash-in-lieu of land was donated might object if park funds are expended for park acquisition in another vicinity of the city or county. Sound policies governing the acceptance of cash, and the subsequent expending of the funds can minimize political controversies directed at the governing officials [Appendix J suggests a number of policies to guide the expenditure of park fund monies].

Reserve Private Park Land

The MSPA (Section 76-3-607, [3] [b]) allows a subdivider to deed private land within the proposed subdivision to a property owners' association to be held in perpetuity for park land as a means of meeting the park requirement, at the discretion of the governing body. The governing body may require cash-in-lieu or dedicated park land even though the subdivider deeds a sufficient amount of private land for park purposes.

Maintenance of private park land often is a problem. After a large percentage of the lots are sold many of the lot buyers may not take an interest in maintaining the park area. When a local government approves a subdivision with reservation of private park land it can overcome the maintenance problem by requiring the formation of a property owners' association. The association should be incorporated as a non-profit corporation with the Montana Secretary of State. Specific provisions in the association by-laws for assessing lot owners and requiring regular maintenance of the park area will give the local government some assurance that private park areas in subdivisions will not become weed infested or depositories of litter and junk.

Future and long term maintenance of parks will more likely occur if the local government requires the subdivider to initially develop the park land. Where the subdivider grades the area, plants grass and trees, puts in sprinklers and other improvements and installs the playground and recreation equipment, future lot owners are more likely to ensure that the maintenance program required under the property owner's association is carried out.

In most counties private park land associated with subdivisions is placed in the suburban tracts tax classification. The property taxes are assessed against the property owners' association.

8. Property Owners' Associations

A property owners' association provides a reliable means by which lot owners can carry out maintenance and other responsibilities associated with property and facilities owned in common within a development. Without a property owners' association, or where an inadequately structured association may exist, the parks, roads, water and sewer systems, other common facilities frequently do not receive proper upkeep or improvements because no one is clearly responsible.

Property owners' associations can benefit the residents of a development by assuring that facilities can be maintained. They also can serve a general public benefit by relieving the general taxpayer from paying the costs of maintaining facilities which serve only the residents of a particular development.

Property owners' associations often are required to be formed as part of the subdivision approval process. The reason for requiring formation of an association is to guarantee that facilities will be maintained, but without cost to the general public. Where local

officials require formation of a property owners' association, they should also require proper formation as an incorporated non-profit corporation; the association must file articles of incorporation with the Montana Secretary of State. The association also should adopt by-laws which contain a number of required provisions.

The Model sets forth on page 13 a number of requirements that should be included in the by-laws:

1. that the association is formed and incorporated before any property is sold or leased;
2. that every property owner and subsequent buyers must belong to the association;
3. that the common property is perpetually reserved for the designated purpose;
4. the association specify responsibility for liability insurance, property taxes, and facility maintenance;
5. how the costs will be allocated among property owners, and that the assessments will be a lien on the property;
6. how the association will adjust assessments to meet changing needs and costs;
7. how the association will enforce the provisions of its by-laws;
8. that the permission of the governing body is required before the association can be dissolved or the restrictions modified;
9. that the association has a specific program for regular maintenance of roads, parks, buildings, drainage facilities and other common facilities.

The above suggested provisions indicate that the concern of local officials is assurance that the association will be formed and organized so as to be held accountable for carrying out its purposes, and that the association or property owners cannot abrogate their responsibilities.

The subdivision administrator can facilitate better operation of property owners' association by developing model or standard language that can be used to meet the above, and any other, provisions which the governing body may require.

An alternative to a property owners' association is to require dedication of facilities (e.g., park land, drainage easements, sprinkler systems and road easements) to the public and the formation of a maintenance district. Residents within the district are assessed for park maintenance and the governing body charges an administrative fee commensurate with its administrative costs, or allows the property owners' association to administer the district, usually under a contract for maintenance.

Because property owners' associations often fail to provide the maintenance services they were created to perform, local officials should carefully consider whether requiring an

association is wise from the public perspective. Initial costs for construction, installation and development of parks and other facilities should be borne by the developer, and (if necessary) delayed installation can be backed by improvements guarantees. For long term maintenance few options are available, however.

9. Variances

Variances, or deviations from regulatory provisions, serve an important function in all types of land use regulations. But, haphazard issuance of variances has diminished the effectiveness of many sound zoning ordinances and subdivision regulations.

Variances provide legitimate relief to owners of properties that may have unusual characteristics that make strict compliance with the regulations virtually impossible. For example, if a tract is located in terrain where compliance with road grade limitations cannot be fully met, the local officials might grant a variance from the grade provisions if they believe a steeper grade will not cause any public problems (e.g., slope failure, erosion, dangerous traffic conditions).

Three important points must be made with regard to granting variances from local subdivision regulations. First, variances should be granted only to the design standards of local regulations. Variances should not be made to the procedural requirements. Generally, the MSPA sets out statutory requirements for procedures in plat approval and a governing body is not authorized to alter those procedural requirements. Where local subdivision regulations establish discretionary procedural requirements, variances should not be granted to allow a person to "short cut" the process.

The second point is that courts have held that "hardship" does not relate to a person's financial or economic situation, and local officials should not issue a variance because a person pleads that he is having financial difficulties. "Hardship" refers to physical conditions or configurations of a property that make strict compliance impossible or extremely difficult.

The third point relates to instances where a local government finds that it is issuing a considerable number of variances from the subdivision standards. A high number of variances suggests that the adopted standards are not correct for the community, and local officials need to reassess their standards.

Section 76-3-506, MCA, of the MSPA allows (but does not require) a governing body to grant variances from local regulations. The act requires a governing body to base a variance on specific criteria specified in its local regulations. To grant a variance it must be shown that strict compliance with the regulations will both create a "hardship" and that the variance will not affect the public welfare.

The Model sets out a number of sound provisions for handling variances. On page 50 of the Model, the granting of a variance is limited only to the design standards of the local

regulations. The Model further limits variances by prohibiting granting of variances in designated 100 year floodways.

By only allowing variances to design standards, the Model prohibits the granting of variances for non-compliance with the review criteria. In addition the Model specifically prohibits granting a variance where the subdivision would not comply with an adopted comprehensive plan or zoning regulations.

The Model sets other requirements that must be met before a variance may be granted:

- The variance cannot adversely affect the public health, safety or general welfare, nor be injurious to adjoining properties.
- The particular physical and topographical conditions or configurations of the specific property would make compliance with the regulations very difficult.
- The variance would not cause a substantial increase in public costs.
- The variance will not place the subdivision in nonconformance with any adopted zoning regulations or comprehensive plan.

Under the Model innovative energy conservation measures are recognized as a possible valid reason for granting a variance, provided that the purpose of the subdivision regulations are not circumvented.

The Model requires subdividers to request a variance from the particular regulations and to provide the facts that indicate a hardship at the time they submit the preliminary plat for approval. The governing body may impose conditions to ensure the subdivision meets the purposes of the regulations, stating the facts and conditions of the variance.

10. Approving or Disapproving Subdivisions: Legal Considerations

Approving a Subdivision

In recent years neighbors and other people are increasingly scrutinizing, and in many cases, opposing new developments in their communities. The reasons for opposing land development are varied, but opponents often have strong feelings and can be active in their opposition.

People are becoming more and more knowledgeable about land development and are becoming adept at identifying potential impacts. They appear at public hearings with well prepared statements, have organized participation at hearings and meetings, and are represented on occasion by an attorney or professional spokesman.

Opponents increasingly understand that a necessary legal basis for subdivision approval is the adherence to proper procedures. They are challenging local approvals of unpopular subdivisions primarily on procedural grounds. Local officials' failure to follow proper procedures is a more easily proven vulnerability. However, opponents also often express

opposition in terms of non-compliance with the adopted comprehensive plan, local subdivision standards, and review criteria.

While the threat of a legal challenge to subdivision approval can be frustrating for local officials, it has the effect of counteracting the threat of challenge by the developer. Local officials cannot avoid legal challenge simply by "playing safe" and approving all subdivisions.

Just as local officials must have solid documentation of the problems that bring a decision to disapprove, they must have solid documentation of the reasons for approving a subdivision. Usually they will know the specific issues raised by opponents of a subdivision. They might prevent a future challenge by addressing those issues, and how the decision was made in light of those objections (placing conditions on the approval is the most common means of overcoming problems without denying a subdivision). If officials express the reasons in the motions for approval, opponents of a subdivision may be more willing to accept the decision.

Disapproving a Subdivision

People are becoming more inclined to challenge local decisions in court. That tendency may be even stronger where a developer has a considerable amount of money at stake in the approval or disapproval of a subdivision. Therefore, when a governing body believes it must deny a proposed subdivision, several actions must be properly executed and documented.

First, both statutory and locally adopted procedures must be carefully followed. Because procedural requirements are specific and therefore deviations are more easily identified, they are easier to challenge in court than are substantive decisions. Second, denial of a subdivision must be related to its non- compliance with local design standards or review criteria. Where local regulations specify, non-compliance with an adopted comprehensive plan would be grounds for disapproving a subdivision. The denial must be in writing with the reasons for denial stated, and local officials are required to send a copy to the subdivider.

Procedural provisions include receiving a preliminary application as specified in the local regulations, publishing a timely hearing notice, holding a hearing, making a planning board recommendation within 10 days after the hearing, taking action by the governing body within 60 days for major subdivisions (35 days for minor subdivision).

The disapproval of a subdivision for non-compliance with local design standards usually is legally sound. The design standards are dimensional or specific and little judgement is involved in determining whether a subdivision complies or not. In addition, the role of the design standards in protecting the public health and safety is readily understood.

Caution is required to disapprove a subdivision based on a weighing under the five primary review criteria. Typically, a finding that the subdivision should be denied is based on a number of problems involving at least several of the criteria. The more specifically the meaning of each of the five primary criteria is defined the easier local officials can assess a proposed subdivision. In addition, a decision regarding the five primary review criteria will be more legally sound with specifically defined criteria.

As with the primary review criteria, determining whether a subdivision complies with a comprehensive plan is much easier if the plan sets out specific criteria or requirements that minimize vagueness and personal judgement. A comprehensive plan can identify areas where subdivisions of a certain type (e.g., residential, high density, or commercial) are discouraged or prohibited. If a proposed subdivision clearly would be in a geographic area in which subdivisions do not comply with the comprehensive plan, the subdivision can be denied.

Whether or not a comprehensive plan identifies geographic areas and the allowed or prohibited uses, a plan can specify development policies that apply throughout the jurisdiction. Examples of development policies include:

- Prohibit adverse impacts on irrigation canals, ditches, other irrigation facilities, water supplies or pumps;
- Require land developments in heavily forested areas to provide multiple access (and escape) routes in case of fire;
- Prohibit development in flood prone areas.

Development policies can be adopted to serve an entire jurisdiction and a proposed subdivision that would not conform to the policies could be denied for non-compliance with the plan. The best approach is to incorporate these policy statements as specific requirements in local subdivision regulations. Where a comprehensive plan is used to approve or deny subdivisions, the plan should set forth policies as explicitly as possible. As with any land use regulatory system, the more specifically the requirement is stated, the better the process will function.

Local officials commonly are subjected to public criticism from the subdivider or others when a proposed subdivision is disapproved. In some cases the developer has tried to have the planner removed or the planning program dissolved. All representatives of the local government – the subdivision administrator, planning board and elected officials – need to be ready to answer public criticism by having solid documentation and sound rationale for a decision to disapprove a subdivision.

Also, public criticism may be reduced by having a representative of the local government explain to the news media exactly the reasons for denial of a subdivision. The representative should outline the alternatives the subdivider may have, such as redesigning the development or decreasing densities.

11. Drainage Plans

Proper removal or disposal of storm water from a subdivision is important to avoid damage to private and public property, deterioration of roads and other facilities, and contamination of soils, vegetation and surface waters. Disposal of storm runoff water can be subject to several different problems. On level terrain storm water may tend to accumulate and stand for long periods, creating mud, ponds and other problems associated with standing water.

On the other hand, sloping terrain, especially steep terrain, can cause erosion, washing and deterioration of roads, fills, and other facilities. Water can run off and accumulate in undesirable locations, such as private yards, roads and streets. Runoff waters can flow into streams and other surface waters creating excessive sedimentation, which could harm fish and other wildlife populations. These problems often cause financial damage to private and public property.

Experience has shown that as urbanization proceeds, storm water runoff and related problems increase. Greater volume and velocity of runoff results from removing vegetation and increasing the amount of impervious surface. Over the years, water, through scouring, eroding, and silting, has established a state of hydraulic equilibrium. That equilibrium can easily be disturbed through the types of construction activities associated with subdivision development.

Potential problems associated with a proposed development are:

- blocked or relocated natural drainages;
- draining or filling of wetlands;
- erosion in drainages because of vegetation removal;
- improperly designed or installed culverts or bridges;
- ponding and redirecting of storm run off water; and
- undesirable runoff collection or accumulation area.

A grading and drainage plan, and its implementation, is a means of properly dealing with storm water runoff. Under both the MSPA and the MSIS a subdivider is required to submit a grading and drainage plan.

A drainage plan should describe the existing (predevelopment) drainage pattern and discuss how drainage through the development is to be controlled. It is not enough simply to route the runoff water through the development. Proper drainage requires:

- Adequate ditches along streets;
- Adequate culverts crossing streams and at approaches;
- Soil protection to stop erosion;
- Means to ensure that downslope property or lakes and streams will not be adversely affected; and

- A proper area for the runoff water to collect.

Information needed to adequately assess a drainage plan include:

1. A topographic map. The map needs to have sufficient scale and detail to assess flow patterns and slopes; generally a contour interval of 10 feet is minimal and 5 feet or less is better. The topographic map should overlay the plat so that the location of streets, lots and open areas are defined.

2. A discussion of soil, vegetation and precipitation data. The report should describe soil types, vegetative cover, and precipitation patterns. Also an analysis comparing predevelopment runoff patterns to post development runoff potentials is important. A good method to use for runoff predictions is the SCS Engineering Field Manual, Chapter 2, Supplement 1 titled: "Estimating runoff in Montana." Other useful methods are available but some technical judgement is required in their use. The subdivision administrator will benefit from assistance from the local SCS office or other people who have experience in the field in interpreting the runoff calculations.

3. An analysis of ditch and culvert capacities. The administrator should seek the assistance of people in the area with knowledge of flow capacity. Manufacturers' references are available to provide culvert flow information. Some counties have adopted minimum driveway and roadway culvert sizes to be installed. The county road supervisor often is able to determine the proper sized culvert.

4. A plan to maintain drainage, prevent flooding, and mitigate downstream impact. The plan should be kept simple. The level of detail should be matched to the size and complexity of the development. Expected flow patterns can be shown by arrows on the topographic map.

The DHES developed a "Guideline for Storm Drainage in Subdivisions." The publication specifies that drainage structures within the subdivision must be designed to handle the 2 year 6 hour storm or must be in accordance with local requirements, whichever is more stringent. The 2 year 6 hour criterion applies to flows originating within the subdivision. Drainage structures that carry flows originating outside the subdivision should be designed to handle the 25 year flood.

The primary objective of a drainage plan is to assure that runoff caused by the subdivision will not exceed or change the pattern of historic runoff.

Factors to consider in reviewing a drainage plan include:

a. Ditches and culverts are adequately sized to carry required flow;

b. The drainage flow path should not create unnecessary ponding or change the point of exit of water from the property (especially avoid directing the water through the neighbors' yard if it wasn't historically flowing there). If storm drains are contemplated, a professional engineer is needed to assist in the evaluation. Factors affecting drainage flows include:
   - straight alignment between manholes;
   - pipes sloped to maintain a 3 feet per second velocity when flowing at full capacity;
   - outfalls protected by riprap or splash pads to prevent erosion (An outfall is the outlet, or final flow, of any stream, drain, sewer, storm sewer, culvert, flume or other water conveying facility).

c. Methods are proposed to prevent downstream areas from increased flow. This could be a plan to detain runoff and only allow discharge at a rate equal to the predevelopment rate. Sometimes retention ponds, storm sewers or channeling are proposed. Detention can be accomplished by dams, channel roughening or other means. When these methods are proposed, however, maintenance becomes a concern. Usually the more complicated the plan the higher the operation and maintenance costs.

   Curbs and gutters usually are not used in rural subdivisions or subdivisions with large lots. Instead, drainage swales are typically used in rural or low density developments. Drainage swales are an advantage because water is removed through percolation, and methods are available to slow flows, such as coarse tall grasses or ditch blocks to flatten grades. Requiring drainage easements that protect these swales from development is a low-cost, effective and aesthetic means of handling runoff.

d. Plans are outlined for revegetating or otherwise protecting all disturbed areas. Developers can control what happens on streets and utilities but they have less control over the lot owner. The plans that apply to the lot owner should be simple and practical.

e. Responsibility for system maintenance must be clearly defined. Will the property owner be responsible to keep the culvert under his approach cleaned out or will the governing body? Who will keep the storm sewer cleaned and maintained?

f. Any disposal of storm water in a state river, stream or lake must not degrade the receiving waters.

If water quality information is not currently available for the receiving water it may be necessary to collect samples at the DHES Water Quality Bureau's direction and then provide the Bureau with quantity and quality information about the runoff water. The Bureau will then decide under what conditions (if any) a discharge will be allowed to occur.

12. Roads

Topographical, climatic, urban/rural characteristics and road department capabilities are unique to each local jurisdiction. Therefore officials will need to develop road standards suitable for their particular jurisdiction. Consultation with the county engineer or road superintendent, sheriff's department and emergency services coordinator will help in developing effective road standards. The Montana Department of Transportation is a good source for technical advice, and it has several publications on road approaches, road widths, drainage swale slopes, and road classification criteria.

Access for Property Owners and the Public

A looped road system provides two or more access points to the property. Loop roads distribute traffic, allow for flexibility in maintenance and provide emergency vehicles with means to reach a property even when one access may be blocked.

On the other hand, many property owners prefer the use of cul-de-sacs to reduce traffic, promote cluster development and create quiet neighborhoods. Establishing criteria for various types of development is a responsibility of local government. Some considerations include:

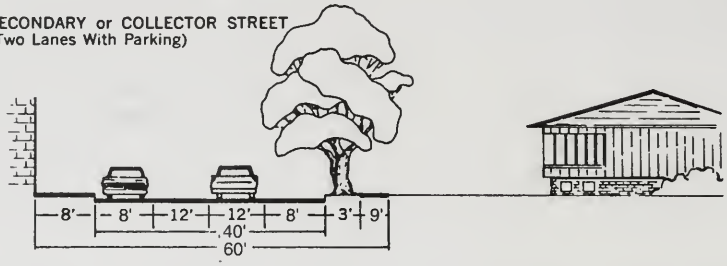
- Emergency services. The development should be designed for ready access by fire, emergency medical, disaster assistance, law enforcement vehicles and to minimize potential hazards.
- Transportation. The development must accommodate current and future traffic needs. Anticipation of future development on surrounding properties also helps determine individual road requirements in a subdivision.

Traffic Capacity

Most interior subdivision roads are classified as local streets. Several factors define the capacity of a road: width, grade, curvature, sight distance, distance between intersections and approaches, surfacing and speed limit. The Model suggests specific standards for roads in both rural and urban subdivisions [also see references on traffic and street design in Appendix H].

- Width. Traffic driving lanes should be a minimum of 10 feet wide; 12 feet is desirable. In rural areas where drainage swales are constructed to remove road surface runoff, and lots are one acre or larger, parking lanes usually are not needed. Where on-street parking is desirable (generally in urban developments) parking lanes of 8 feet should be provided. Using the guidelines for driving lane and parking lane widths, any road section can be easily determined. For example:

2 driving lanes each 12 feet wide plus 2 parking lanes each 8 feet wide totals a 40 foot wide road surface.



Road widths for collector and arterials should vary with traffic loads. The widths in the Model are acceptable as guidelines, but for a major collector or arterial assistance from the Montana Department of Highways or a qualified engineer is advisable.

- Grade. Acceptable road grades vary with climate and maintenance capabilities. Information from the U.S. Forest Service and the Department of Highways and local government's maintenance capabilities will assist in developing standards for grades on various types of roads. Considerations for setting road grade standards include:
  - length of grade
  - presence of road curves along the grade
  - possibility of plowing snow downhill

  For example, steeper grades may be permitted on short sections of straight road (less than 500 feet), than on long sections or for grades on a curve. Also, local equipment may not be able to plow snow on a 10 percent grade, but if the road is looped the equipment may be able to plow downhill on the steep section and the 10 percent grade might be acceptable. As can be seen, involving the local maintenance personnel is critical in developing standards that are realistic for the local jurisdiction.

- Curvature and Sight Distance. The Model sets standards for road curvature and sight distance. The U.S. Forest Service and Department of Highways also have standards and references that can help in setting local standards. In general, sight distance and curvature standards are not as flexible as grade and width standards because they more directly affect safe travel.

Road Plans

Local government can greatly assist developers and local officials by publishing a document that includes road construction standards and a profile and cross-section illustrating construction of roads. The developer needs to submit a street plan, road profile

and cross- section of the proposed streets and roads within the subdivision as part of his preliminary plat proposal.

- Plan and Profile. The road plan and profile should consist of a scale drawing showing the road centerline, grade, alignment and the existing grade. From this information local officials can see where drainage will flow, how steep grades will be, and how the roads relate to topography, lots, intersections and curves.

  Potential problems of maintenance or public safety can be created by steep grades, intersections at road curves, poor sight distances and improper drainage. It is helpful to review the road plan along with the drainage plan to determine if the road network and surface drainage will function properly together. By requiring road plans to be submitted at the same scale as the preliminary plat local officials can more easily review and understand the effects of the proposed road network.

- Cross-section. Local road standards should suit the types of roads commonly built in the jurisdiction. The standards include specifications for subgrade materials, a gravel base and a fine gravel top course. Where pavement or chip seal is used, a specification for these surfaces is needed. Often, judgement must be used on the roads standards, and the advice of the road supervisor or an engineer is vital.

  In local jurisdictions with specific road standards, the developer is required to build to those standards. If a county does not have road standards, the developer may be required to submit a detailed cross-section. Adoption of standard road specifications will help assure that road construction is uniform among all subdivisions.

Drainage Swales

Rural roads usually are built with drainage swales. Road swales and side slopes need to be steep enough to discourage vehicle parking or crossing, yet not so steep as to cause erosion. Side slopes of drainage swales that are steeper than 4:1 but are less than 3:1 accomplish all the above objectives. The swales must be deep enough to accommodate the anticipated drainage flow and to allow placement of required culverts.

To minimize plugging, blockage and other maintenance problems culverts need to be at least 12 inches in diameter. An engineer needs to determine the proper size of each culvert based on the expected flow volumes.

Surfacing.

Most rural roads will be graveled and most urban roads will be hard surfaced (paved with materials such as asphalt or concrete). In between are situations that require some

flexibility and judgement. Intensive commercial development at a rural intersection may create a need for hard surface for dust control and durability. A small clustered residential subdivision in a rural area generating minimum traffic volumes, however, may not warrant hard surfacing.

Determining the proper type of surfacing requires evaluation of a number of considerations: number of vehicle trips, travel speeds, amount of road relative to the number of lots, location in relation to schools, parks or recreation areas, and maintenance requirements of the various types of surfacing.

Road Approaches

A "road approach" is the point at which a road or driveway intersects with a public road, providing direct access onto that public road. The Montana Department of Transportation requires a state highway permit before any person may construct an approach onto a state of federal highway. The approach must be located and constructed in conformance with state adopted approach standards.

County commissioners are authorized under Title 7, Chapter 14, Part 21, MCA, to adopt standards governing approaches onto county roads and to require that approach permits be issued for new approaches. The requirements for new approaches may include: properly sized culverts, adequate sight distance, adequate width and minimum spacing, and a paved approach apron. A county approach permit system greatly enhances safety and public costs.

Where a county does not have an approach permit system, approach specifications can be adopted as part of the local subdivision regulations. While the county will not have control over parcels exempt under the MSPA, it can assure public safety and minimal public costs for access proposed to serve subdivisions.

Considerations include: restricting approaches near intersections (approaches should be at least 50 feet from intersections), and setting minimum spacing standards for approaches. Sharing approaches on busy roads and streets may be appropriate, as well as limiting approaches to one per lot or some other standard that relates to lot use.

Large commercial enterprises need more access than a residence, but they also cause more congestion. Setting approach standards for commercial or industrial property can be aided by observing similar existing situations and by reviewing a 1983 set of approach standards published by the Department of Transportation.

E. IMPORTANT FACTORS IN MAINTAINING AN EFFECTIVE REVIEW PROCESS

1. Conducting Public Hearings

The purpose of a public hearing is to allow the general public the opportunity to express ideas, comments, support, and criticism of a subdivision proposal. Private land development affects the public, and citizens of a community have a right to express their concerns and feelings. Also, public hearings are a means of providing procedural due process which is a legal requirement of all land use regulations.

Citizen comment may seem irrelevant at times, and public participation in public decision-making sometimes may appear to be a nuisance for local officials. But usually public involvement results in better decisions. To make the best use of public comment, local officials must learn to sort relevant, constructive comments from those that are not pertinent.

Several procedures can be employed to avoid bedlam at public hearings, and to allow the hearing to fulfill its purpose -- allowing citizens to be heard and to help provide local officials with perceptions of the public's perspective. Where hearings become unruly, legitimate testimony cannot occur, or loses its impact, in the chaotic atmosphere.

The first key to holding an orderly and constructive hearing is to have the person in charge be firm and be capable of keeping the proceedings under control. Rules on the conduct of the hearing should be set forth at the outset. For example, any person testifying might be required to stand and give his name, or to make his presentation at a lectern, podium or microphone. This assures that one person at a time is speaking and eliminates the tendency for persons in the audience to get into arguments or discussions among themselves. Also, experience has shown that a person who must stand and has to speak before a podium or microphone tends to feel more compelled to be "busi-nesslike" or objective, and to offer constructive comments.

The procedures should not be so formal or intimidating as to discourage the shy and the reticent from offering testimony. Often the quiet person can offer some of the more thoughtful and constructive remarks. The rules of conduct should specify whether those offering public comment can ask questions, and if so of whom -- the subdivider, the planner, the planning board, the governing officials. The public needs to be informed of the procedures at the beginning of the hearing.

Local officials, in listening to public testimony, should pay attention specifically to comments that address the design standards, the review criteria, and provisions of the comprehensive plan.

Technical information from local, state or federal agencies may be presented at the public hearing. More often, agency personnel tend to write or to express their comments directly with the subdivision administrator before or after the hearing. Information from

agencies is usually very useful and relevant to the issues that must be considered in subdivision approval.

But comments from the general public, although often with much less support by technical data, can be very beneficial in raising questions that can be examined by a professional or technical person.

The local officials and planning board members simply may have to face the issue of how much consideration will they give to a subdivision's general unpopularity with the public. It would be advantageous to have some policy on considering public opposition where the unpopularity is weakly tied to the review criteria of 76-3-608, MCA.

2. The Merits of Good Organization

Being well organized has its own rewards: research time and costs are cut by easy access to information; efficiency of the office is improved; stress is reduced; and new personnel can be trained, or become acquainted, more easily through the use of a "system."

There are five organizational tools that are consistently used by planning staffs in subdivision review:

1. Filing system. The filing system can be as simple as a cabinet with an index file, or as sophisticated as an office computer. One office's system consists of a standard metal file drawer with subdivision files in alphabetical order. An index often is maintained as a card file.

2. Libraries. Generally documents are organized by subject area. References important to subdivision review include the comprehensive plan, subdivision regulations, zoning regulations, river basin studies, state and local road standards, special environmental studies and other special studies prepared for the county or other agencies.

3. Checklists. Each jurisdiction needs a slightly different subdivision checklist depending on its own regulations and policies. (Examples of these are included in Appendix M). Checklists can assure that the planner has addressed each applicable provision of the law and that all required information has been received from the applicant.

4. Personal references. During the course of subdivision reviews, there will be agency and other personnel who will consistently need to be contacted, including state health department personnel, the county road foreman, the historical society, the floodplain administrator, and others. A personal phone file and a state directory are invaluable.

5. Tickler files. Even the well-staffed and organized offices have difficulty tracking the expiration dates of performance bonds and conditions for approval. One fairly simple method of monitoring is a file or binder organized by month into which check guarantees, letters of credit and conditions of approval are inserted by month of expiration. A staff member or secretary is assigned to check this each month to assure that applicants are complying with conditions and making promised improvements.

3. Communicating With The Public

Contact with the public generally occurs at three levels: (1) daily interaction with applicants, their representatives and citizens interested in a particular development; (2) contact at public hearings; and (3) communication through the news media.

When contacted by the public regarding a potential subdivision, it is extremely helpful to be able to provide written materials on procedures and requirements. Published subdivision regulations, copies of pertinent sections of the MSPA and Uniform Standards, brochures, maps and available plans or policies can supplement discussions. Because the planning office is sometimes viewed by developers as an unnecessarily restrictive agency, it is advantageous to be as helpful, courteous and efficient as possible to minimize that image. Also, landowners will have more respect for regulations when they understand the purpose. **The subdivision administrator needs to be able to explain the reason for each requirement in the subdivision regulations.**

As to communicating with the public before, during and after a public hearing, a well thought out approach is often the most successful. Before a hearing, an assessment needs to be made as to whether the proposal will be controversial, what time and cost can be spent notifying the public, and what the legal notification requirements are. All too often, legal advertisement is all that is conducted, serving to justify a common accusation that the public has not been adequately informed.

If a project appears controversial, the subdivision administrator needs to encourage public participation on all sides. This can be accomplished by articles with graphics in local media, phone calls to appropriate neighborhood leaders, or groups, and by contacting persons known to have an interest, such as adjacent landowners. The easiest route would seem to alert as few people as possible to avoid conflict. However this approach has often resulted in angry confrontation because people believe there was a deliberate effort to deprive them of their opportunity to support or oppose a project. Keeping a log of all articles, contacts and notification made to generate public participation is extremely useful if you need to verify your efforts.

At the hearing, citizens must feel that they have access to the political process. Testimony at public hearings gives participants the opportunity to vent frustrations and to feel assured that they are being heard. Having copies of the preliminary plat and

supplemental documents available at the hearing for public review will help the citizens feel better informed and a vital part of the process.

After the hearing, the media is the best link with the public. Informing and cultivating the interest of a reliable local reporter can better assure that issues will be reported swiftly and accurately. Working closely with the local media can be advantageous to the subdivision administrator. An interview with the newspaper or radio station provides the opportunity to explain a proposed subdivision or proposed changes to the regulations. Drafting news articles for the newspaper gives the subdivision administrator an opportunity to give his views on subdivision regulations and the local process.

An axiom of public communication and involvement is to encourage as much of it as time and budget will permit.

4. Negotiations With Subdividers

Often points of disagreement arise between the planner and an applicant over subdivision approval. One of the primary complaints of developers is that subdivision regulations and procedures cause undue delay. Because there are costs associated with unreasonable delay (which could ultimately increase the cost of housing for the consumer), every effort should be made to streamline procedures and provide consistent and understandable information. Conflict and undue delay can be avoided by employing the following methods.

One of the most successful means of helping the applicant design a subdivision that meets regulatory requirements is a pre-application meeting. If the subdivision administrator is aware of an impending subdivision proposal, a pre-application meeting should be scheduled. The meeting should include any officials who might be subsequently involved in the review (e.g., the floodplain administrator, heads of the fire district, water or sewer system). The subdivider is informed of dates of planning board meetings, governing body meetings, hearings and other aspects of the process. Through these preliminary discussions, the applicant also can receive information that helps him produce a preliminary plat that conforms to policies and regulations, and thereby save time and money and avoid confrontation.

A subdivision checklist and schedule should be handed out at the earliest possible contact with the applicant. The checklist outlines the procedures for acceptance of applications, including other offices that need to be contacted and schedule of meeting dates. Further, a brief explanation of what each submittal should contain at each stage is extremely beneficial to the applicant. During these preliminary discussions the subdivision administrator needs to provide the applicant with current written or verbal policies of the governing boards and any amendments to regulations or standards.

If the subdivision administrator and subdivider disagree with either the preliminary plat or the staff analysis, the second stage of discussion, prior to hearings, should be a negotiating session. For example, after the staff analysis there may be minor conditions that simply need an explanation. However, if a set of conditions is recommended, the subdivision administrator needs to be prepared, not only to justify those recommendations, but to provide the applicant with some realistic options for redesign or amendment.

The subdivision administrator also needs to clarify that his role is serving as a trained technician, and that the political boards conduct any negotiations and make final decisions on the proposal (assuming that is the policy of the local government).

The most common reasons for conditional approval or denial are non-conformance with design standards, inconsistency with the master plan, or philosophical differences over the type of development proposed. The subdivision administrator needs to do thorough research to determine if his recommendations are realistic, economically feasible, reasonable and consistent. The developer will be much more willing to accept changes if they provide benefits commensurate with the costs, are consistent with the staff's treatment of similar proposals, and allow a modified version of the original idea.

Discussions with professional or experienced subdividers often differ from those persons proposing a development for the first time. A discussion with an experienced subdivider will focus more on the specifics of design and the particular subdivision, and less on the procedures. The experienced developer usually understands the process and believes time is better spent on details of the current proposal.

However, when a person comes in to discuss his first subdivision, the subdivision administrator will want to spend considerable time on the procedures because the subdivider will be unfamiliar with the process (and in many cases, its purpose). Typically, the first-time subdivider will have a small development -- a minor subdivision or a small mobile home park. These smaller developments usually are less complex and the design specifics can be addressed readily.

Misunderstanding and difficulty can be avoided if the planning board or the governing body set out clear policies with the subdivision administrator regarding who participates on behalf of the local government in negotiations with the subdivider. Will the subdivision administrator represent the planning board? Will he represent the governing body? Will members of the planning board routinely attend any meetings with the developer?

It is very important that the subdivision administrator and the planning board clarify the responsibilities, latitudes and limits of the subdivision administrator in dealing with subdividers.

Most subdividers will appreciate the time the subdivision administrator spends early in the process. A clear understanding of the procedures and requirements can greatly decrease

the preparation time for a subdivider. The subdivision administrator must be sensitive to the impacts of time delays on a subdivider. The subdivision administrator must avoid needless delays, and should ensure that planning board members also conduct their review promptly.

5. Minimizing Administrative Problems

a. Timing

Coordination is needed when a project is subject to several review processes: subdivision approval, a zoning permit, and annexation approval.

Because each approval has its own process, coordinating the hearings and planning board or zoning commission meetings and governing body actions requires a systematic approach.

The difficulty often arises when a proposed project is adjacent to a municipality and needs municipal water and sewer services, and the city is enforcing extraterritorial zoning outside its corporate boundaries. The county must give the project subdivision approval, the municipality must grant a zoning permit (if a conditional use permit is required the process is even more complicated), and the municipality must approve annexation in order to extend water and sewer services. The problem can become more complicated if there are two planning boards (e.g., a county board and a city planning board) or in addition, two separate staffs.

The subdivision administrator should examine the county and municipal procedures for the processes surrounding various approvals to determine if subdivision approval can be coordinated with other approval processes. Such coordination may require special procedures and the developer may have to agree to extend preliminary plat approval beyond the 60 days in order to expedite the overall process.

b. Delays

A number of delays in the approval process can be caused by the local government. One that occurs frequently, especially in rural communities, is the lack of a quorum at planning board (or governing body) meetings. Although occurring inadvertently, lack of a quorum has often caused at least a month's delay for a subdivider. The fact that planning board members serve without pay, and frequently serve on a number of different boards or committees in their community, contributes to this problem.

The subdivision administrator can help prevent the problem by contacting planning board members well in advance and determining whether a quorum can attend. Either the subdivision administrator or the planning board chairman should press members of the board to attend when action on a subdivision is scheduled.

The governing body may wish to write its local subdivision regulations so that planning board recommendations may be made by those members present. When no planning board quorum is present the recommendation could be made to the governing body with a notation about the lack of a quorum. The important consideration is to avoid delaying a subdivision proposal simply because the local government process breaks down.

Everyone acting on behalf of the local government should work to avoid delays in making decisions, but if the local government fails to make a decision within the 60 day preliminary plat approval period, (35 day for minor subdivisions) the proposed subdivision is not automatically approved. However, the local government is vulnerable for a civil lawsuit, most likely a writ of mandamus which forces the governing body to take action.

c. Continuances and Extensions of Deadlines

Extensions of time deadlines necessitated by the operation of local government are to be avoided if possible. Occasionally, unusual circumstances arise which prevent some aspect of the local government process from occurring by a legal deadline. But if the local government frequently fails to meet statutory or regulatory deadlines for notice, hearings, recommendations or decisions, local officials need to examine their procedures and correct a problem.

d. Adding or Changing Standards and Requirements

Occasionally, the governing body will add conditions or requirements as part of its responsibility for making a decision on a preliminary plat. For whatever reason, elected officials might impose conditions that were not recommended by the subdivision administrator or planning board. The MSPA specifically prohibits the local government from imposing additional requirements or conditions after preliminary plat approval.

The governing body has the right to make a decision which does not conform to the recommendations of the planning board or subdivision administrator. However, where the governing body generally heeds the recommendations of the planning board, several positive results usually occur. First, the planning board maintains confidence and high morale in carrying out its responsibilities. Second, the public and subdividers maintain confidence that planning board and subdivision administrator involvement are important, and that there is consistency in decisions throughout the subdivision approval process.

There may be legal vulnerability if the governing body imposes requirements or conditions that are clearly outside the scope of the requirements specified in the local subdivision regulations. Where the subdivision regulations set out specific standards and requirements that must be met, and the local government has clear policies to guide it in decisions, there should be consistency among the subdivision administrator, planning board and governing body in what is expected of a subdivider.

F. MINOR SUBDIVISIONS

1. Minor Subdivisions - Definition

Under the MSPA, subdivisions qualifying as "minor" subdivisions must be reviewed under different procedures. Subdivisions qualify as minor subdivisions if they have five or fewer lots, have proper access to all lots and no land would be dedicated to the public for parks (instead cash-in-lieu would be donated to a park fund in the case of residential subdivisions). "Proper access" must be defined by the governing body. Typically, the road standards in the local subdivision regulations define "proper access." Legal access from a public road to the subdivision is required under the MSPA.

The first minor subdivision from a tract of record must be approved, conditionally approved or disapproved by the governing body within 35 days from the date the application for plat approval was accepted for submittal. The requirements for a hearing and an environmental assessment are waived and cannot be imposed by the governing body for the first minor subdivision from a tract.

2. Minor Subdivision Review

The procedure for review can vary. Usually the planning board reviews the proposed plat of a minor subdivision and makes a recommendation to the governing body at a regular meeting. In jurisdictions where the governing officials meet at least once each week, or every two weeks, time allows both planning board review and action by the governing body within the 35 day time limit. Some counties require that all plats be submitted by a certain time prior to the planning board meeting, and the 35 day time limit is triggered by that submittal deadline.

The Model suggests, on page 19, that subdividers be required to submit a minor subdivision application to the subdivision administrator 10 days prior to a regular meeting of the planning board. The subdivision administrator reviews the application to determine if it is complete. If the application is complete the subdivision administrator makes a report to the planning board to help in drafting its recommendation to the governing body.

If the application is incomplete, the subdivision administrator identifies the deficiencies and returns the material within five days to the subdivider. The subdivider may choose to correct the deficiencies and present the application to the planning board.

For local jurisdictions that do not have a subdivision administrator, the Model suggests a review option in which the subdivider submits the application materials and fees at regular meeting of the planning board. The planning board reviews the application to determine whether the information is complete. When the planning board accepts the application, the 35-day review period begins. At that meeting, the planning board usually reviews the subdivision under the review criteria of 76-3-608, MCA, and drafts a recommendation for approval, conditional approval or denial for the governing body. In

order to allow governing body action within the 35-day time period, the planning board has few options but to review the minor plat at the meeting in which the plat is submitted.

If the planning board determines that the application is incomplete, the application and fees are returned to the subdivider with a statement describing the deficiencies.

For minor subdivisions, the MSPA does not specify whether a preliminary plat must be submitted or if a subdivider may submit a final plat. By submitting a final plat with all surveying and monumentation properly completed, a subdivider could take the chance that the planning board and governing body will not require changes in the plat. If the plat is approved, he could file it with the clerk and recorder upon obtaining DHES sanitation approval and submitting other required documents. But if the subdivider submits a preliminary plat and triggers the normal review process, he has much less money and time invested which may be lost if changes are required by the local government.

Section 76-3-505, MCA, requires that local subdivision regulations include procedures for summary review of minor subdivisions. The Model gives the subdivider a choice of submitting a preliminary plat accompanied by the supplementary materials and information required of preliminary plat applications, or of submitting a final plat drafted in conformance with the "Uniform Standards for Final Plats" (ARM 8.94.3003). On pages 21 and 22 the Model sets out procedures for filing a final plat of a minor subdivision.

Under Section 76-3-505, MCA, a local government is authorized to require that a preliminary plat and accompanying information and materials, rather than a final plat, be submitted for minor subdivision approval. The advantages of a preliminary plat are that local officials are more willing to require appropriate changes and conditions of approval that can be enforced through approval of a final plat. The local officials also avoid dealing with "rush jobs" in which important considerations can be easily overlooked.

If a local government chooses to require minor subdivisions to be submitted as preliminary plats, officials may want to help to abbreviate the review by closely examining the submittal requirements for a preliminary plat application and eliminating any requirements which may not be necessary for adequate review of small developments.

An alternative for planning boards with no subdivision administrator is to require minor subdivision plat submittal five or 10 days prior to the planning board meeting, and give a plat review committee of the planning board time to meet and discuss the proposal. The plat committee would be able to make knowledgeable comments and recommendations to the planning board. Such a process might necessitate that a minor subdivision application be submitted to some office that kept regular hours, and that office would have to contact the members of the plat review committee.

The irrevocable waiver of a public hearing and an environmental assessment and the requirement that the governing body must act within 35 days apply only to the first minor

subdivision from a tract of record. A "tract of record" is a single parcel of land held in undivided ownership that can be identified by legal description from documents on file in the office of the county clerk and recorder. A second or subsequent minor subdivision may be reviewed under additional procedures, either as a "regular minor subdivision or as a major subdivision. Section 76-3-505, MCA, authorizes the inclusion of additional requirements of summary approval in local regulations, and those additional requirements would apply to second and subsequent minor subdivisions from a tract.

For example, a local government may require all or part of the environmental assessment to be prepared, or that a hearing be held. The Model requires a public hearing and notification of adjacent landowners for a second or subsequent minor subdivision. Local regulations could specify conditions or situations in which a hearing would be held, or when an environmental assessment would be prepared (and what parts would be addressed). For example, if the first minor subdivision contained only one lot, the local regulations might allow a second minor subdivision to be reviewed without a public hearing.

The planning board or governing body should at least set guidelines addressing when (and what) additional requirements would be applied. Guidelines, criteria or policies would help prevent the planning board or the governing body from not offering similar treatment to different people.

3. Minor Subdivision Approval

The approval of a minor subdivision is based on the same considerations as for a major subdivision – the governing body must issue a written findings of fact that discusses and weighs the following criteria:

(1) Effect of agriculture, local services, the natural environment, wildlife and wildlife habitat, and the public health and safety;
(2) Compliance with the requirements of the MSPA and the regulations and review procedures of the local regulations;
(3) The provision of easements for location and installation of any necessary utilities; and
(4) The provision of legal and physical access to each parcel within the subdivision and the notation of that access on the applicable plat and any instrument transferring the parcel.

In addition, local regulations may require compliance with an adopted comprehensive plan, zoning or other regulations.

Without an environmental assessment, much information needed to evaluate a minor subdivision often will be missing. The subdivision administrator may have to rely on his personal site inspection, records check and knowledge of the site and area. As with a major subdivision, the governing body should require an improvements guarantee backed by a financial security where the subdivider wants to defer installation of improvements.

4. "Low Impact" Minor Subdivisions

Passage of 1993 amendments to the MSPA means that many land divisions that formerly were exempt from local subdivision review now must be reviewed and approved by the local governing body. Now, a number of land divisions that create one or two additional parcels will need local review. Subdivisions that create only one or two parcels often will have fewer impacts than higher density development. Therefore, the review process can be conducted more quickly, and in many situations the design standards can be less stringent than for larger subdivisions.

When these one or two lot subdivisions" are created within an urban or suburban setting, it is important that they be designed as part of the larger community and to be compatible with the surrounding land use pattern. Roads, utility easements, drainage facilities and lot and block layout should fit into the established or establishing plan and pattern of surrounding properties.

Subdivisions that create one or two lots in a rural setting usually do not create significant problems associated with residential development. However, by nature of their location in rural areas, these subdivisions can create substantial impacts on wildlife, habitat, water quality, public access and other elements of the natural environment.

These subdivisions can appropriately be reviewed under expeditious procedures, but should meet the design standards governing all other subdivisions. **Subdivisions of one or two lots that do not meet all of the above criteria would be reviewed under the regular procedures for minor subdivisions.**

Because local governments probably will be reviewing a significant number of one and two-lot subdivisions in the future, allowing these very small subdivisions to be identified by a number, rather than a name seems appropriate. To minimize confusion from the traditional method of using a number to identify certificates of survey and names to identify subdivision plats, numbers on subdivision plats might be given a distinctive prefix, such as an "S" for "subdivision." A decision to use a special subdivision plat numbering system for small subdivisions is a decision that should be made by the county commission in consultation with the county clerk and recorder.

To expedite the process, review of "low impact" subdivisions should be administrative only. The subdivision administrator or plat review committee would make recommendations directly to the governing body, who would take action. Where a governing body holds regular meetings more often than once per month, expeditious review and approval is possible.

The Model defines "low impact" subdivisions as those subdivisions where:

1. Only one or two additional lots would be created,
2. The proposed subdivision is the first division of land from a tract of record,

3. The property owner has not previously used the occasional sale or family conveyance exemptions on adjacent parcels, and
4. The proposed subdivision is not located on land:
    a. unsuitable for development, as defined by local subdivision regulations
    b. subject to natural or man-made hazards, or
    c. where significant adverse effects on wildlife, the natural environment or public health or safety would occur.

The intent of the procedures for "low impact" subdivisions is to expedite the review of subdivisions that have minimal impact. However, even a one or two lot subdivision could warrant a more extensive review. For example, a subdivision administrator may want time to consult appropriate agencies or technical persons for comment. In another situation, a number of small subdivisions might have been created in a vicinity and the local officials want time to assess the cumulative impacts. The fourth criterion of the Model above defining "low impact" subdivisions is a "safety valve" for local officials to allow them more time for review in unusual situations. The 35-day review period applies for a first minor subdivision from a tract of record. A local government that meets at least twice per month should be able to review and approve a "low impact" subdivision in 15-21 days, provided no problems or complications arise.

Municipalities and counties that have existing planning staff should be able to handle expeditious review of "low impact" subdivisions fairly easily. The most likely problem will be that the 1993 changes to the MSPA will cause a larger work load for the staff and governing body, and in many cases, for the planning board.

Municipalities and counties that do not have existing planning staff likely will have more difficulty handling subdivision review responsibilities. In most of these situations, the local government probably has had little subdivision activity and therefore has had little or no experience in subdivision review. Although a local government may not experience a large amount of subdivision activity, it should be prepared to deal with the occasional subdivision in a timely manner.

For these local units of government, finding a person to conduct the review and obtaining training and expertise will be the top priority. Planning consultants who are reasonably available and affordable could be one option. Another option is to have a county commissioner or city alderman serve as administrator. A person who could represent the local government, such as a planning board member, a courthouse employee, or the county sanitarian, could serve as the local subdivision administrator.

"Low impact" subdivisions should meet the design requirements that apply to all other subdivisions with the possible exception of the road standards. Where parcels are created for seasonal use or where traffic volumes will be minimal, allowing roads to be built to lower standards may be appropriate. If these lower standards are acceptable, the standards should be noted on the final plat and on any instruments of conveyance.

Local officials should set policy regarding road standards for "low impact" subdivisions. Before incorporating reduced road standards for "low impact" subdivisions, local officials should consider potential problems. The responsible fire district might not be able to provide adequate fire protection services. Future development may result in increased traffic volume that would exceed the capacity of the lower standard roads. Lots that were created originally for seasonal use may be used on a year–round basis at a later date.

Local officials at least should require an easement of sufficient width that the roads can be upgraded to meet the higher standards of the local subdivision regulations if circumstances change in time.

Local officials have important decisions to make in order to find a balance between proper access and reasonable standards for subdivision roads that will have minimal traffic volumes. Below are suggested reduced road standards for local jurisdictions to consider in drafting road standards for "low impact" subdivisions.

a. When a "low impact" subdivision is situated where no further development or no future increase in traffic volume will occur, any or all of the following standards may be approved when deemed appropriate by the governing body:

   (1) right–of–way width: level terrain – 40 ft;
   hilly terrain – 50 ft.
   (2) road width: 20 ft.
   (3) the requirement for all–season access is waived.

b. When these standards are approved for a subdivision, the standards must be noted on the final plat and any instruments of conveyance.

G. AMENDED PLATS/RESUBDIVISION

Once a subdivision plat has been filed with the county clerk and recorder a plat can only be changed by filing an amended plat. A plat amendment includes the further dividing of lots shown on the original plat, realignment of existing lot lines, deletion of lots or reduction of the number of lots within a plat. The clerk and recorder and subdivision administrator must examine certificates of survey to assure that they are not amending a platted subdivision.

The term "resubdivision" is usually used to mean the further dividing of existing lots within a filed plat. As mentioned, resubdivisions must be filed as amended plats. Plat amendments can be proposed to change all of an original plat, or only a portion.

Amended plats are handled the same as original plats. If the amended plat involves six or more lots, it must be reviewed by the local government as a major subdivision. Those review requirements include holding a public hearing and submittal of an environmental

assessment (except where the land involved contains fewer than 10 lots and less than 20 acres, or where the subdivision complies with an adopted master plan). A preliminary plat must be submitted and approved, and a final plat must be prepared and filed with the county clerk and recorder.

One of two situations occur when a plat amendment is submitted that affects five or fewer lots within an existing platted subdivision. In the first, a proposed plat amendment which would increase the number of lots (i.e., constitute a "resubdivision" of existing lots) must be handled as a minor subdivision -- with review and approval by the governing body. The final amended plat submitted for filing must comply with the Uniform Standards for Final Plats, except that the title must include the word "Amended."

In the second situation, a proposed amended plat of five or fewer lots which aggregates lots or relocates common boundaries without increasing the number of lots does not need governing body approval under Section 76-3-207(1), MCA. These land divisions, however, require DHES sanitation approval, unless the lots are served by municipal water and sewer facilities and no extension of those facilities is proposed.

The subdivider prepares a final amended plat which conforms to the "Uniform Standards for Final Plats" and submits the plat to the clerk and recorder for filing. In place of the governing body's approval the landowner certifies that the approval of the governing body is not required pursuant to Section 76-3-207(1), MCA. The clerk should review it and have the examining land surveyor, subdivision administrator or any other person review it as they would any final plat before the clerk and recorder files it.

Requiring written consent of the owners of all lots affected by a plat amendment assures that all are aware to the changes to their lots and concur.

H. CORRECTED PLATS

A corrected plat is filed to correct surveying or drafting errors on a filed plat, provided the governing body deems the corrections will not materially alter the plat. The error(s) may be corrected by submittal of a corrected final plat which is entitled:
"Corrected Plat of ____(name of subdivision)____ Subdivision."

The reason for the correction must be noted on the face of the corrected plat. Where a resurvey was conducted, the surveyor shall endorse the corrected plat and note the defects of the original plat and the corrections made.

The landowner or his surveyor may submit a corrected plat for filing, or the governing body may initiate and bear the cost of resurveying or re-drafting a plat that contains survey or drafting errors. A corrected plat must conform to the survey and drafting requirements of the "Uniform Standards for Final Plats" (ARM 8.94.3003).

I. MOBILE HOME/RECREATIONAL VEHICLE PARKS; LEASE SUBDIVISIONS

Any tract of land held in single ownership and divided by renting or leasing portions of the tract is a subdivision created by rent or lease. This includes a mobile home or recreational vehicle park.

Whenever a landowner proposes to rent two or more spaces for mobile homes or recreational vehicles (regardless of the size of the tract), or proposes to lease or rent one or more parcels from a tract, the proposal becomes a "subdivision" under the MSPA and must be reviewed and approved by the local governing body. The one exception is that land to be rented or leased for agricultural purposes does not require subdivision approval by the governing body.

Before renting or leasing parcels or establishing a mobile home or recreational vehicle park, a subdivider must prepare a preliminary plat of the development, submit profiles and specifications of improvements, and obtain approval from the governing body.

Subdivisions created by rent or lease must be reviewed under the same preliminary plat procedures required for typical land subdivisions. Subdivisions with six or more parcels must have a hearing and environmental assessment, while those requirements are waived for the first minor subdivision from a tract, and can be waived for the subsequent minor subdivisions. At the end of the preliminary plat review the governing body acts to approve, conditionally approve or disapprove the subdivision.

The governing body can require that part or all of the required improvements be installed before any parcels or spaces can be rented or leased, or the local officials can allow the subdivider to defer part of the improvements by entering into an improvements agreement, and can require a financial security to guarantee the agreement. Usually, with mobile home or recreational vehicle parks, local governments require installation of all improvements before allowing rent or lease of spaces (the Model reflects this approach, page 41).

As with other land subdivisions, the governing body can provide for inspection of required improvements to assure conformance with the approved construction plans and specifications.

Because title to parcels will not be transferred, no survey is necessary, so subdivisions by rent or lease are exempt from the surveying requirements and from the filing of a final plat. In lieu of filing a final plat, local subdivision regulations should require that the subdivider submit a plan conforming to the requirements of the preliminary plat. The plan should be drawn to approximate scale and show the lot layout, location of improvements, roads and traffic facilities. If it is a mobile home or recreational vehicle park, the individual spaces and a typical location of a mobile home unit within a space must be shown.

Approval of the final plan can be made by the subdivision administrator, a review committee of the planning board or the governing body. The approved plan should be maintained in a designated office (e.g., planning office, clerk and recorder or city clerk).

Mobile home parks and recreational vehicle parks also must be approved by the DHES under The Tourist Campground and Trailer Court Act (Title 50, Chapter 52, MCA). The local subdivision regulations should specify coordination with state and local health officials to assure that all approvals are in order before improvements to the park or court are installed or before spaces are rented or leased.

Note: Several other approvals are required of mobile home parks. The DHES Food and Consumer Bureau reviews the water and sewer plans. The Architecture and Engineering Divisions of the Montana Department of Administration reviews the service building plans. After an engineer has certified that the service building has been constructed in accordance with the approved plans and specifications, the Food and Consumer Bureau issues a license to the park. That license must be renewed annually.

J. COMMERCIAL/INDUSTRIAL SUBDIVISIONS

The procedures for reviewing and approving subdivisions proposed for commercial or industrial uses are virtually the same as for residential developments. A preliminary plat must be submitted and approved. For subdivisions with five or fewer lots the subdivision is a minor subdivision and the requirements for a public hearing, and environmental assessment do not apply. Where parcels will be sold, a survey and an approved final plat are necessary. If the lots are to be rented or leased, no survey nor filing of a final plat is necessary, but a final plan should be submitted to assure compliance with preliminary plat approval.

One major difference in approval of commercial and industrial subdivisions is that no park land is required. The rationale is embodied in a 1964 Montana Supreme Court decision (*Billings Properties v. Yellowstone County*, 144 Mont. 25, 1964), which established that the legal grounds for exacting park and playground dedication in residential subdivisions is that the residents of the subdivision create a need for parks and playgrounds and the park dedication relieves the general public of the cost. That basis for park dedication isn't present for non-residential subdivisions.

Commercial and industrial subdivisions should be reviewed with consideration to differences in a number of the design standards. Most of the requirements for residential subdivisions apply, but consideration should be given to the fact that truck and larger or heavier vehicles may be using the roads. Wider roads might be needed; wider approaches onto public roadways may be required to accommodate trucks; adequate room for off-street parking is essential for commercial subdivisions; areas on each lot should be available to provide loading ramps or areas and allow maneuvering of service trucks; a grading and drainage plan needs to reflect the increased area of parking and

other impervious surfacing; different levels and standards of fire and police protection and solid waste disposal may be needed; lighting and signing requirements may be different.

Certain requirements, such as fire and police protection, may not be quantified or expressed as standards, and the subdivision administrator will need to rely on the heads of those departments to review the proposal and set the requirements on a case by case basis. Other standards, such as road widths, approach widths, and area for off-street parking usually can be specified in the subdivision regulations.

K. PLANNED UNIT DEVELOPMENTS (PUD'S)

The planned unit development (PUD) is a development concept in which the developer has flexibility to use innovation and creativity in the design and layout of a development. Typically, larger amounts of open space, wider use of common space and facilities, are emphasized. A mix of residential types and commercial uses often are incorporated. Smaller individual lots, clustering, interspersal of open space, narrower roads are often used to focus on open space as one of the attractive features of a PUD. Often, a PUD is used where a site has a design constraint that limits its development as a conventional subdivision (e.g., a site that is partially in a flood hazard area).

Local subdivision regulations can incorporate a section for PUD's which provides flexibility in certain standards, allowing the subdivider creativity in subdivision design to promote economies in services, enhance open space and clustering, and protecting unique natural features. PUD design usually is more constrained by local zoning regulations than by subdivision regulations, so it is important to consider conformance to local zoning regulations in subdivision approval of PUD's.

The Model recommends a procedure in which a subdivider applies to the planning board to have the subdivision designated and reviewed as a PUD. That application is submitted and approved or disapproved before the preliminary plat application is submitted. After the planning board approves or disapproves designation of the subdivision as a PUD, the subdivider submits the preliminary plat for review under preliminary plat procedures.

The Model requires that to be designated a PUD a proposed subdivision must promote clustering of individual building sites, and achieve one or more of the following:

a. Preserve natural features
b. Provide economies in provision of roads and other services
c. Preserve agricultural land
d. Protect important historic sites or wildlife habitat
e. Provide developed recreation facilities

The Model recommends the above conditions for designation as a PUD to assure that real benefits will result from the offering of flexibility in design standards.

The design standards most commonly permitted to be modified for PUD's are roads, lots, blocks, and park requirement (the 1/9 requirement cannot be waived, but flexibility in location and ownership is offered). The Model places much emphasis on planning, designing and constructing roads and other improvements in relation to topographic conditions and other natural features, and on promoting the public convenience and safety. Subdivision review of PUD's involves the same considerations as typical subdivisions. The basis for subdivision approval must be conformance with design standards and other applicable regulations, and a determination that the development complies with the review criteria under 76-3-608, MCA. PUD's often are large developments by Montana perceptions, and the size or even simply the term "planned unit development" can elicit concern by neighbors and other citizens. A PUD may generate much public comment, and local officials should give careful thought about weighing the primary review criteria.

Sound policies and procedures for handling improvement agreements and financial guarantees will be important for dealing with PUD's because typically the large size creates a desire on the part of the subdivider to defer installation of part of the required improvements. [See Appendix L for discussion of improvement agreements].

Planned unit developments can be very attractive and functional, and can be designed to better "fit" with topography and natural features than can typical subdivisions. The local government should ensure that innovations in design do not adversely affect the public health and safety. Benefits that result from the offering of flexibility under a PUD should accomplish more than just allow a developer to cut corners on costs of improvements.

L. CONDOMINIUMS/TOWNHOUSES

The MSPA specifically subjects condominiums to review and approval as subdivisions. Therefore buildings and land developments which are to held in condominium ownership must obtain local subdivision approval and DHES sanitation approval.

Condominiums are subject to the Unit Ownership Act (70-23—102, et seq., MCA). The Unit Ownership Act governs the operation of condominium projects, including sales of units, adoption of bylaws, maintenance of common property and facilities, and release and foreclosure of liens.

The MSPA does not define "condominium," and no single authoritative definition exists, except perhaps that in the Unit Ownership Act. The Model provides a definition which expresses the commonly accepted key points: "a form of individual ownership with unrestricted right of disposal of one or more units in a multiple unit project with the land and all other parts of the project held in common ownership or use with owners of the other units." The key is that "condominium" is form of ownership rather than a characteristic or type of project, and at least part of the building or land, or both,

must be held in common ownership by the owners of individual units. Condominium ownership can complement planned unit developments.

The MSPA provides an exemption in Section 76-3-203, MCA, for condominium buildings constructed on parcels created in compliance with the act. The Model gives a suggested interpretation that exempts condominium buildings that are constructed on lots approved as subdivisions after July 1, 1973, where the lots were approved based on the anticipated construction of condominiums.

The subdivision administrator should check to determine whether the land was approved for condominiums and for multiple family use. Construction of multiple family dwellings on a lot approved with the understanding that it would be for single family residence can create problems of water and sewer demands, traffic volumes and parking. Often local governments keep a log or index of past subdivision applications. If not the subdivision administrator can review the minutes of the governing body or planning board meetings. A good policy is to put the number of units approved for each lot on the face of the final plat in the case of multiple family lots.

Condominium developments should be reviewed under the same procedures and with the same design standards as a typical subdivision. Where PUD designation has been approved, the flexibility in the pertinent standards needs to be recognized.

As with PUD's, condominium land developments are often large developments by Montana perceptions, and considerable public opposition may emerge. The review criteria should be carefully weighed to demonstrate that the final action was thoughtfully considered.

Townhouses have no definition in Montana law, but they generally are considered to be multiple-family dwellings that differ from condominiums in that the owner of a unit holds title to the land beneath the unit, in addition to sharing in joint ownership of the common area and facilities of the development. Owners of condominium units, on the other hand, do not hold exclusive title to any land within the development, but only share in joint ownership of common areas and facilities. Townhouses are subject to subdivision approval and surveying and filing requirements.

Part III – Certificates of Survey, Exempt Land Divisions

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PART III CERTIFICATES OF SURVEY; LAND DIVISIONS EXEMPT FROM SUBDIVISION REVIEW

A. WHAT IS A CERTIFICATE OF SURVEY? WHEN IS IT FILED?

A certificate of survey is prepared and filed for all surveys of land divisions that do not require local governing body approval as subdivisions.

The Montana Subdivision and Platting Act (MSPA) defines a certificate of survey as "a drawing of a field survey prepared by a registered surveyor for the purpose of disclosing facts pertaining to boundary locations."

A registered land surveyor must submit a certificate of survey for filing if the survey:

a. provides material evidence not appearing on any map filed with the county clerk and recorder or in the records of the U.S. Bureau of Land Management;
b. reveals a material discrepancy in a map;
c. discloses evidence to suggest that alternative locations of lines or points are appropriate; or
d. establishes one or more lines that are not shown on a map and cannot be located except by trigonometric calculations.

In other words, if a field survey shows any information that is new or differs from information already shown on a survey, a certificate of survey must be filed with the clerk and recorder of the county in which the survey was conducted. The surveyor must submit the certificate for filing within 180 days after completing the survey.

The Department of Commerce has adopted administrative rules (Uniform Standards for Certificates of Survey, Administrative Rules of Montana 8.94.3002) specifying the requirements that a certificate of survey must meet. Generally, a certificate of survey shows the lengths and bearings of survey lines, primarily for boundaries of parcels, rights-of-way, or other separate parcels.

Parcels 160 acres or larger, and parcels created under the exemptions in Section 76-3-207, that cannot be described as consisting of 1/32 or larger aliquot parts of a government section [see Diagram: Aliquot Parts of a Section, page I-14], must be surveyed (Section 76- 3-401, MCA). The survey must be filed as a certificate of survey with the clerk and recorder before the parcels can be sold. Governing body approval is not needed to file a certificate of survey, but the certificate of survey must meet drafting and surveying requirements set forth in the "Uniform Standards for Certificates of Survey."

A number of land divisions may be made without a survey or filing of a certificate of survey. Parcels created for rent or lease but not for sale may be created without a survey, although they must be reviewed and approved as "subdivisions." Parcels larger than 160

acres, or qualify as an exemption from subdivision review, and can be described as a 1/32 or larger aliquot part of a U.S. government section may be created without a survey by describing them on a deed or other instrument conveying title. Also, parcels created under the exemptions of Section 76-3-201, MCA, may be created without a survey by describing them on a deed or other instrument of transfer.

Although those parcels may be created without a survey, landowners often prefer to have them surveyed. Lending institutions usually require a survey before granting a lien, mortgage or loan for property, or before making a loan to construct a house or other building. Surveys of these parcels may be filed with the clerk and recorder and the certificate of survey must be prepared in conformance with the "Uniform Standards for Certificates of Survey."

B. LOCAL REVIEW

Certificates of survey are not subject to subdivision approval by the governing body, but they must be properly prepared before they may be filed, and the land division shown must be eligible for filing as a certificate of survey rather than as a subdivision plat. Although local government has no authority to approve subdivisions under MSPA, many certificates of survey require approval by the Montana Department of Health and Environmental Sciences (DHES) under the Montana Sanitation in Subdivisions Act (MSIS).

The clerk and recorder has the responsibility under the MSPA for assuring that a certificate of survey complies with the "Uniform Standards for Certificates of Survey," and the requirements specified by the MSPA and local government. The MSPA allows counties to engage a registered land surveyor to serve as an examining land surveyor to check certificates of survey for surveying and drafting errors. Typically, an examining land surveyor checks the drawing to see if bearings and lengths of survey lines are correct, the survey "closes," whether an acceptable basis of bearing was used, and the certificate of survey is properly drafted and shows the required information.

A county surveyor who is a registered land surveyor may serve as the examining land surveyor. Because most counties do not have a qualifying county surveyor, they retain a private surveyor under contract to serve as an examining surveyor. Perhaps because of the cost, fewer and fewer counties are retaining an examining land surveyor.

Determining whether a land division may be filed as a certificate of survey can be a complex issue, especially where a county has adopted criteria to define eligible use of exemptions. The clerk and recorder can benefit where a county establishes a system of providing assistance to that office in determining when a certificate of survey is appropriate for filing. The best option is to have the subdivision administrator assist the clerk and recorder's office for the purpose of reviewing certificates of survey for eligibility for filing.

A 1975 state Supreme Court case (*Swart v. Stucky*,167 Mont. 164, 536 P.2d 762) makes clear that filing of certificates of survey cannot be delayed for planning board review. But because it is unreasonable to expect the clerk and recorder in most Montana counties to react instantaneously on complicated filing decisions, the subdivision administrator and others appropriately can serve as agents of the governing body to assist the clerk and recorder's office in reviewing certificates of survey.

Regardless of who participates in the examination of certificates of survey, the review is <u>not</u> for purposes of ensuring proper land development design, but for the purpose of determining that a use of an exemption is legitimate and not an attempt to evade the intent of the MSPA.

C. USE OF EXEMPTIONS; EVASION CRITERIA

One feature of the MSPA that has generated much contention and controversy, both within the state legislature and at the local level, is the provision allowing certain parcels to be exempted from local subdivision review. The statute allows the use of the exemptions "...unless the method of disposition is adopted for the purpose of evading this (act)...". This "umbrella" language does not define what circumstances constitute use of an exemption for "the purpose of evading " the MSPA. The language can allow abuse of the exemptions to create de facto subdivisions.

The legislature has not clarified legitimate uses of some of the exemptions. But the state Attorney General (40 Op. Atty Gen No. 16, 1983) has clearly held that local governing bodies have the right to define legitimate use of the exemptions, or to define what constitutes an intent to evade the act. The Attorney General held:

"... The question of whether an exemption is claimed 'for the purpose of evading' review under the act is one of fact to be decided by the local government in the first instance, taking into consideration all of the surrounding circumstances ... A local government may require a person claiming an exemption from subdivision review to furnish evidence of entitlement to the claimed exemption..."(40 Op.Atty.Gen#16, 1983).

Local governments may define legitimate use of the exemptions but they may not revoke the reasonable use of any exemption. A legitimate use is intended for each exemption, and any local qualification of use of an exemption should reflect that legislative intent and appropriate court decisions and attorney general opinions.

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1. Occasional Sale Exemption

Between 1973 and 1993, most divisions of land into parcels of less than 20 acres were handled as an exemption to subdivision review as "occasional sales." Thousands of certificates of survey showing parcels created under this exemption are on file in offices of the county clerk and recorder. The 1993 Legislature eliminated the occasional sale exemption, and since April 6, 1993, no certificate of survey showing the exemption may be filed.

2. Gift or Sale to a Family Member Exemption

Until 1993, Section 76-3-207, MCA, provided that "divisions made outside of platted subdivisions for the purpose of a gift or sale to any member of the landowner's immediate family" are not subject to local subdivision review. The exemption for a gift or sale of a parcel to a member of the immediate family was intended to allow transfer of a parcel to family members for their own use. However, the exemption often is used as a subterfuge to allow creation of many parcels for conveyance to a family member for further resale.

The Attorney General ruled that the term "immediate family" refers to a landowner's spouse, children or parents, by blood or adoption (Informal opinion to Alan Jocelyn, Nov 8, 1979).

The 1993 Legislature restricted use of this exemption to a "one-time only" transfer in each county to each member of the immediate family. Most county evasion criteria require a deed or other instrument of conveyance to accompany the certificate of survey to assure that the exempted parcels are actually transferred to the family member. The deed, contract for deed or other instrument often is written to allow space for entering the number of the certificate of survey as soon as the clerk and recorder has assigned the number to the certificate of survey. The grantor (landowner) should sign a certifying statement indicating that the transfer to the family member is the first and only transfer in the county (See Appendix E Key to Filing).

3. Agricultural Exemption

Section 76-3-207(1)(c), MCA, exempts from subdivision review "divisions made outside of platted subdivisions by sale or agreement to buy and sell where the parties to the transaction enter a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes."

The agricultural exemption is intended to allow creation of parcels smaller than 160 acres for agricultural use. Creating an agricultural parcel without local review is appropriate because agricultural uses do not cause the development-related problems of concern under the MSPA.

The landowner and the buyer must enter into a covenant stating that (1) the land will be used only for agricultural purposes, (2) the covenant can be revoked only with the mutual consent of the governing body and property owner, and (3) the covenant runs with land.

In order to convert the property covered by the covenant to a non-agricultural use, the governing body must consent to removing the covenant. The MSPA requires that a change in use from agriculture subjects the property to the "provisions of this chapter," which is generally interpreted to mean obtaining subdivision approval. Thus, the proposed change in use is subject to consideration under the review criteria 76-3-608, MCA, installation of improvements, and where applicable, conformance with zoning and other regulations or an adopted comprehensive plan.

Most proposed changes in use will be for home sites. The governing body should require proper roads, bridges, culverts, access, and proper grading and drainage facilities. The owner must obtain approval of sanitation facilities under the MSIS to build a dwelling or other structure requiring water or sewer facilities if the parcel is less than 20 acres in size.

The agricultural exemption is popular not only because the parcel is not subject to local subdivision approval, but also because it is not subject to sanitation approval under the MSIS. A landowner can divide a parcel under the agricultural covenant, avoid both reviews, and sell the parcel. However, a subsequent buyer often inadvertently finds himself burdened with a parcel that has little utility as a building site.

A number of problems surround use of this exemption. One is the lack of definition in the MSPA of "agricultural use." Developers have attempted to use this exemption to create building sites, claiming that a house is part of an agricultural use. Another problem of definition relates to whether agricultural processing uses, such as grain elevators, alfalfa dehydration plants, feedlots, farm and ranch equipment dealerships, or veterinary clinics are "agricultural" uses. These definitions can be clarified in the local evasion criteria.

In addition, a problem often arises when the exempted property is sold. The new owner either is unaware of the covenant, or attempts to have the covenant revoked only to find that the parcel cannot comply with local subdivision or health regulations. The tragic aspect of this problem is that the original owner who used the agricultural exemption to create a small parcel to avoid subdivision review, bears none of the hardship of finding an economical use for the parcel.

In counties where the subdivision administrator and sanitarian are in separate offices, or information is not routinely shared, the owner of an agricultural exemption might receive a local septic tank permit because health officers were unaware that the parcel is constrained by the agricultural covenant. Thus, a lot owner assumes he may use the parcel for residential purposes, only to find that he still is constrained by the agricultural covenant.

Therefore, coordination of review between the sanitarian and the subdivision administrator is critical. This could be achieved under a procedure whereby a certificate of survey is routinely checked for an agricultural covenant prior to issuing a county septic tank permit.

Since 1993, legitimate use of this exemption to create agricultural tracts up to 160 acres will occur. However, the practical need to create a legitimate agricultural parcel of less than 20 acres seldom occurs, and local governments should exercise caution whenever an agricultural exemption for a small parcel is proposed. Counties can avoid many of the problems simply by adopting policies or procedures that require anyone claiming an agricultural exemption to demonstrate that the parcel actually will be used for a legitimate agricultural purpose, and that the exemption is not a subterfuge to create a parcel without local subdivision or health review.

Carefully scrutinizing proposed agricultural exemptions to determine their legitimacy is the best means to avoid the problems surrounding use and abuse of this exemption.

Local evasion criteria can require that the prospective buyer provide plans or other evidence that the parcel actually will be used for agricultural production. The criteria can specify that agricultural use means no dwellings or commercial or industrial structures. Sheds, barns, fences, storage bins or buildings and other structures associated with raising crop or livestock, of course, are appropriate for an agricultural parcel.

The criteria can also define agricultural use as meaning the production of crops or livestock only, and therefore prohibit processing or other activities that create sanitation, traffic and other development problems of concern under the MSPA.

Local policy can require that agricultural land proposed for sale to an adjacent landowner be exempt from local review under the exemption for relocation of a common boundary. The landowners benefit from avoiding the covenant procedures, and the local government benefits because the exempt parcel can become part of another tract and is not a separate parcel that can be subsequently transferred -- thereby creating potential problems for an unwitting buyer.

4. Security for Construction Financing Exemption

Section 76-3-201(2), MCA, provides that neither local government review nor a survey is required for a division of land that "is created to provide security for construction mortgages, liens, or trust indentures."

The legitimate use of the exemption to provide security for construction mortgages, liens, or trust indentures is to allow a landowner buying property the opportunity to create a

separate parcel within that property to offer as security for financing to build his home (or building if a commercial or industrial parcel). Lending institutions require a separate one or two acre parcel as collateral or security for a loan or other financing to erect a dwelling or other building on that parcel.

With the elimination of the occasional sale exemption, local jurisdiction may see more frequent attempts to use the "construction mortgage" exemption as an inappropriate means to create building lots without review. Local officials should diligently review each proposed use of this exemption to ensure the use conforms to the intended purpose.

The fact that the owner is erecting a home or other primary building on the parcel usually testifies to his commitment to the property, and ensures that the improvements will be installed out of necessity to use the land as a building site.

The MSPA does not require a survey of parcels created under this exemption, but federal loan guarantee agencies require a survey, and virtually all lending institutions require a survey as a condition of securing construction financing.

The most common abuse of the exemption is to create a separate parcel with the ultimate intention of marketing the parcel to a third party. In counties with no monitoring or policies regarding exemptions, the certificate of survey often is filed whether the parcel is needed for financial security or not. In counties that require proof of the need for creating the parcel the landowner enters into a "sweetheart" deal with a lender (usually not a qualified lending institution) who forecloses on the parcel, making it eligible for marketing. This is an inappropriate use of the exemption.

The exemption is also inappropriately used to attempt to secure financing for construction on other property. Most counties require that the construction must occur on the property on which the exemption is used to prevent this inappropriate use.

Local government can curb the abuse of this exemption while maintaining its legitimate purpose by adopting an evasion criterion that requires proof of required security from a qualified lending institution. The proof that a parcel is required to secure financing for a home or other structure on the parcel can be a letter from the lending institution, or a copy of the loan agreement stating the requirement for security. Specifying that a qualified lending institution must require the parcel as security greatly minimizes the opportunity for a fraudulent scheme.

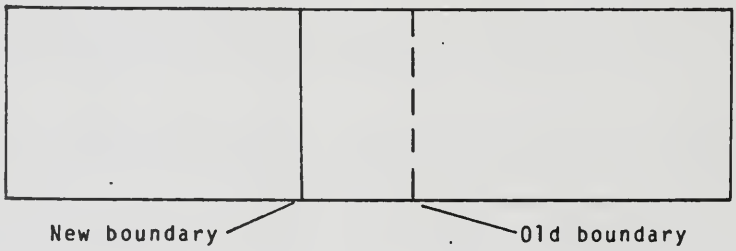
5. Relocation of a Common Boundary Exemption

Section 76-3-207(1)(a), MCA, provides that local subdivision review is not required for "divisions made outside of platted subdivisions for the purpose of relocating common boundary lines between adjoining properties."

The purpose of the exemption for relocating common boundaries between adjoining properties is to allow the owner(s) of adjacent land to change the location of the boundary line between the properties. There are many legitimate reasons for relocating a boundary line between properties, such as: aligning the boundary with a fence or natural feature, moving a boundary to prevent encroachment by a building or hedge, increasing the size of a parcel, or aggregating two or more parcels into larger tracts.

The common abuse of this exemption is to create an additional parcel(s) rather than to change the location of the common boundary between two parcels. The additional parcel(s) would be created by showing on the certificate of survey both the original boundary and the new boundary, thus creating an additional parcel between the old and new boundaries. This is an inappropriate use of the exemption.

The "Uniform Standards of Certificate of Survey"(ARM 8.94.3002) require that for use of this exemption the certificate of survey clearly distinguish between the prior boundary and the new boundary, such as by using dashed lines and solid lines. That provision of the "Uniform Standards" has greatly reduced the misuse of this exemption.



However, there is still the potential for problems, because that portion of land affected by the relocation of the boundary line usually is required by some attorneys or title abstractors to be transferred from one owner to another. The title transfer must be done by transferring a deed from one owner to another. Once the deed is executed, the affected land attains an independent property description.

Local government can overcome abuse of this exemption by requiring that its use does not create additional parcels, and that there are still only two adjoining parcels(unless one has been aggregated as part of the other parcel).

This exemption is subject to sanitation review when structures requiring water or sewer facilities will be built on the property affected by the boundary change.

6. Court Order or Operation of Law Exemption

Section 76-3-201 (1), MCA, exempts from local subdivision review and surveying requirements divisions of land "created by order of any court of record in this state or by operation of law..."

Uses of this exemption could include creation of parcels as part of an estate or divorce settlement, a court ordered settlement of a dissolved partnership, or a division of land held in joint ownership.

An abuse of the exemption would occur where several parties purchased land as joint owners with the purpose of having a court divide the land into a number of parcels under the guise of dissolving the joint ownership by dividing the property among the owners. The difficulty for local officials is determining whether the process was a scheme developed to avoid subdivision review, or whether the court ordered division resulted from legitimate circumstances. To date, while this type of use has been discussed, little abuse of this exemption has apparently occurred.

7. Law of Eminent Domain Exemption

Section 76-3-201 (1), MCA, exempts from local subdivision review and surveying requirements divisions of land "...which, in the absence of agreement between the parties to the sale, could be created by order of any court in this state pursuant to the law of eminent domain (Title 70, chapter 30)."

The exemption for a division that could be created under the law of eminent domain allows a governmental agency, private utility, irrigation district, or any entity with the right of condemnation to create a parcel if the parcel could be created under the law of eminent domain, (that is, condemnation proceedings).

Although a governmental agency, utility, or other entity may have the power to acquire property through condemnation, it does not necessarily have the authority to condemn

all of the types of property it desires. In order to acquire a property through condemnation the property must be essential to the provision of the service. A power company, for example, may be able to condemn a parcel to build a power line, but that same company might not condemn property to build an office building, because the exact location of the office is not essential to the provision of electric power.

The exemption may be used where condemnation proceedings are resolved out of court. **The key is that the affected parcel could have been created by a court under condemnation proceedings.**

8. Cemetery Lots Exemption

Section 76-3-201(4), MCA, provides that no local subdivision review nor survey is required for a division of land that "creates cemetery lots."

The benefit of allowing creation of cemetery lots without a survey or local government approval is obvious, although owners often choose to have cemetery lots surveyed. Shortly after the enactment of the MSPA at least one surveyor and landowner tried to file a certificate of survey creating two-acre "cemetery lots." Understandably, that clumsy ruse rarely has been attempted.

9. Reservation of a Life Estate Exemption

Section 76-3-201(4), MCA, provides that no local subdivision review nor survey is required for a division of land that "is created by the reservation of a life estate." A reservation of a life estate is established when a person sells a property, but reserves the right to live (or use in some other manner) on a portion of the property until his death, at which time the property reverts to the buyer. Generally, reservation of a life estate involves no division of land because the reservation is a right to use the land rather than own it. Therefore, this exemption is rarely used.

10. Rent or Lease of Agricultural Land Exemption

Section 76-3-201(4), MCA, provides that no local subdivision review nor survey is required for a division of land that "is created by lease or rental for farming and agricultural purposes."

Land can be rented or leased for agricultural or farming purposes without local review. The only difficulty that can arise is where a lessee builds a house or otherwise uses the land for non-farming purposes. The governing body would have to discover the house or other use and investigate the records in the county clerk and recorder's office to determine whether the division was an abuse of this exemption.

11. Exemption for State-owned Lands

Section 76-3-205, MCA, provides "The provisions of this chapter shall not apply to the division of state-owned land unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974."

This exemption was included in the MSPA specifically to allow the Montana Department of State Lands (DSL) to sell or lease a parcel of state land on which an existing dwelling is located. On a number of DSL tracts a dwelling has been built in the past, and this exemption allows the Department to divide off an acre and sell the house and lot without local subdivision review. However, the DSL may not use this exemption to sell two or more lots from a single tract for residential use.

This exemption allows any state agency to divide its property for non-residential purposes, or to create one parcel from a tract for residential purposes. For example, the Department of Fish, Wildlife and Parks could use this exemption to sell property for non-residential purposes.

However, under a 1981 Attorney General's opinion (39 Op. Atty. Gen. 14), state agencies must obtain local subdivision approval for land divisions, mobile home or recreational vehicle parks and condominium developments that qualify as "subdivisions."

12. Exemption for Lands Acquired for State Highways

Section 76-3-209, MCA, provides an exemption for lands acquired for state highways, "Instruments of transfer of land that is acquired for state highways may refer by parcel and project number to state highway plans that have been recorded in compliance with 60-2-209 and are exempted from the surveying and platting requirements of this chapter."

At times, in buying highway right-of-way, the Montana Department of Highways finds itself owning small tracts that are unnecessary to the Department's needs for right-of-way. Under this exemption the Department may sell those unneeded parcels if they are shown on highway plans that have been recorded with the county clerk and recorder. The deed or other instrument of conveyance simply may refer to the parcel and highway project number.

If the parcels are not shown on highway plans or record, the parcels must be surveyed and the survey filed as a certificate of survey or a subdivision plat.

13. Remaining Parcels

Although the MSPA does not mention remainders, the possibility that a remainder parcel exists is implicit in the express provisions of the MSPA (Attorney General Letter opinion

to Robert McCarthy, April 22, 1987). However, to be considered a remainder, the parcel must not be created for the purpose of transfer, but must be retained by the owner.

A landowner claiming that a parcel is a "remainder" must present evidence that the parcel is in fact intended to be retained and is not to be transferred. Examples of such evidence include the existence of the land owner's residence on the parcel, or building plans for a structure to be built by or for the land owner.

D. ADOPTING EVASION CRITERIA

Through adoption of evasion criteria local officials can establish a uniform standard for determining whether a claimed exemption to the MSPA is legitimately used. Evasion criteria are policy statements that specify:

1. Circumstances under which an exemption is properly used; and
2. Circumstances under which an exemption would be improperly used, and therefore the proposed land division must be reviewed as a subdivision.

1. Advantages of Evasion Criteria

It is advantageous to both landowners and the public for each county to develop and adopt criteria for defining circumstances when an exemption can be legitimately used. Local surveyors, developers and realtors will take an interest in evasion criteria because those interest groups are the primary users and beneficiaries of the exemptions. Public costs of services and the ultimate effect on local taxes are a major concern with haphazard, unreviewed land divisions.

Adoption of local evasion criteria will benefit the community and landowners by:

1. Safeguarding property rights. Evasion criteria prevent local officials from arbitrarily making judgements regarding the need to subject a land division to local subdivision review. By having written criteria local officials help ensure that all property owners will be treated equally.

2. Clarifying the imprecise language of the MSPA. While the MSPA is vague about the proper use of the exemptions, Montana courts and the Attorney General have provided a number of specific interpretations and established the authority of local officials to determine legitimate use of the exemptions. Local criteria not only brings the piecemeal legal interpretations together, but can provide a unified and comprehensive clarification of the uncertainties surrounding the exemptions.

3. Ensuring a coordinated and expeditious determination. Evasion criteria, by ensuring that all local officials agree on the standards used to determine proper use of the exemptions, will foster coordination in the determination and speed the process.

4. Ensuring protection of the public health and safety. By adopting evasion criteria, local governments can establish a sound legal basis for bringing more land divisions under subdivision review and thereby prevent many of the problems of haphazard and unplanned development: unsafe or inadequate roads, lack of legal access, environmental degradation, high public costs, unsuitable building sites and high maintenance costs.

5. Ensuring enforcement of the MSPA. Evasion criteria simply ensure that the intent of the MSPA is more nearly achieved by reducing abuse of the exemptions.

Appendix F sets forth sample evasion criteria. These criteria are based on Montana court rulings, Attorney General opinions and common interpretations of the MSPA by local officials. The evasion criteria can be adopted as part of the local subdivision regulations, or can be adopted as local government policies. The evasion criteria or policies should not only specify substantive criteria for evaluating use of exemptions, but also should establish procedures for evaluating certificates of survey. The procedures should identify the person or office who will assist the clerk and recorder in determining compliance with the local evasion criteria.

In a number of counties the criteria specify that a review team examine each land division to determine its compliance with the purpose of the MSPA. Typically the subdivision administrator, sanitarian, and county attorney serve on the team. A planning board member and title abstractor might also be members who could contribute.

2. Administrative Procedures

To comply with the *Swart v. Stucky* Supreme Court decision (1975, 167 Mont. 164, 536 P. 2d 762), the county needs to adopt a policy of having the subdivision administrator act as an arm of the clerk and recorder's office, or to act as an agent of the governing body to assist the clerk and recorder in determining whether certificates of survey comply with the Uniform Standards and local policies or evasion criteria.

Local policies establishing evasion criteria should establish procedures for review and determination. Most of the exemptions that require a survey (those in Section 76-3-207) also require sanitation approval under the MSIS, so the county sanitarian will be involved before those certificates of survey can be filed. Local procedures should set out the process for subdivision administrator and sanitarian review before the clerk files the certificate of survey. Several counties have found that a routing slip with the subdivision administrator and sanitarian sign off works well.

Although no court decision or Attorney General opinion has determined what a reasonable time limit for certificate of survey evaluation should be, local procedures should specify a time limit. Allowing one or two weeks is reasonable and will not unnecessarily delay filing of a certificate of survey.

The sanitarian will review the certificate of survey under the procedures of MSIS, so his sanitation review can occur independently and concurrently with that of the subdivision administrator. The important element is that the sanitarian and the subdivision administrator both keep track of all certificates of survey. That is one benefit of a formal routing system among the several persons who examine a certificate of survey.

The purpose of the subdivision administrator's review of a certificate of survey is to ensure that the land division qualifies for filing as a certificate of survey. The subdivision administrator must check to see whether an occasional sale has been taken from the tract within the past 12 month period. Where county policy prohibits use of an exemption on a parcel that was created by an exemption the subdivision administrator must check the clerk's records for a history of land division on that parcel.

The greatest service that the subdivision administrator can provide the clerk and recorder is checking out the circumstances surrounding each certificate of survey and making a determination whether the certificate of survey can be properly filed.

A part of the subdivision administrator's service is bearing the burden of explaining to landowners, or their surveyors and attorneys, that a certificate of survey does not comply with the local evasion criteria. Surveyors, developers and attorneys can be strident, and the subdivision administrator can spare the clerk and recorder the confrontations involving certificates of survey.

After the governing body adopts criteria or policies, the subdivision administrator should see that a copy is readily available in the clerk and recorder's office. It also would be courteous to voluntarily send a copy to the surveyors who commonly work in the county, as well as developers and real estate firms that are involved in land development. A courteous cover letter explaining the purpose and public benefit of the criteria and policies and a request for cooperation could be a positive step for an improved working relationship.

A service that both the subdivision administrator and the sanitarian can provide landowners and surveyors is to arrange a meeting to discuss a proposed land division before the survey is conducted. The landowner can determine if the property likely will meet sanitation requirements, and if the proposed exemption can be used before investing in the cost of a survey and obtaining required data for sanitation review. A cooperative assessment by the subdivision administrator and sanitarian and discussion with a landowner or his surveyor can help create a positive, workable system and relationship with the public.

E. REMOVING AN IMPROPERLY FILED CERTIFICATE OF SURVEY FROM THE RECORDS

On occasion a clerk and recorder may file a certificate of survey that is not eligible to be filed under the complex requirements of the MSPA, the MSIS, or local evasion criteria. No statutory authority or procedure offers direction on how a clerk should remove the improper document from the files. Many clerks and recorders, in the absence of explicit authority, will not remove an improperly filed certificate of survey from the records.

While no explicit direction exists, a 1980 Attorney General Opinion (38 Op. Atty Gen. 106) states that deeds and contracts for deeds that convey title to land in violation of the MSPA are voidable. In those situations one of two situations will exist. If the certificate of survey was recently filed and no further transactions have occurred, the clerk and recorder, may remove all copies of the certificate of survey and copies of any accompanying documents.

In the other situation, where title to land shown on the certificate of survey has been conveyed to subsequent buyers, removing a certificate of survey from the files is more complicated. In some cases the county simply may have to "live with the mistake." Unfortunately, subsequent lot buyers would also be burdened with the problems such an approach creates. For example, it may be difficult for future lot buyers to obtain title insurance for a parcel created by an improper certificate of survey. A comprehensive review of proposed exemptions by county officials is the best means of prevent these mistakes.

Part IV
Enforcement

Part IV
Enforcement

PART IV ENFORCEMENT

A. CATEGORIES OF REQUIREMENTS AND INFRACTIONS

Under the Montana Subdivision and Platting Act (MSPA) a number of different areas and types of requirements exist. Those various requirements create areas for potential violations of the law and local subdivision regulations, and that potential for violations generates a need for diligent enforcement. Occasionally the violations are intentional, but often a person inadvertently fails to comply with one or more of the many different requirements.

The statutory and administrative requirements under the Montana Sanitation in Subdivisions Act (MSIS) add to the complexity of regulations associated with dividing land.

The areas and types of requirements can be summarized into three categories:

1. Requirements for Surveying and Filing a Proper Survey Document:
   - A properly performed field survey;
   - A properly filed certificate of survey or final subdivision plat.

2. Requirements for Local Government Subdivision Approval:
   - A properly approved and filed subdivision plat;
   - Sanitation approval under the MSIS.

3. Requirements After Subdivision Approval
   - Meet preliminary plat conditions;
   - Meet requirements for selling lots through escrow;
   - Meet commitments under improvements agreements;
   - Comply with preliminary plat approval period;
   - Properly place field survey monuments after subdivision plat approved.

Associated with the above categories of legal requirements there are three categories of infractions:

1. Transferring possession or title of a portion of a tract of land without reference to a recorded survey or plat where no exemption from surveying applies.

Improper field surveying, or improper preparation of a survey document for filing are occasional violations of the MSPA. Because the Attorney General has ruled that conveyances of property in violation of filing and recording requirements are voidable (38 Op. Atty Gen. 106, 1980), attempts to circumvent the filing of a proper survey are uncommon. Thus, this aspect of the MSPA is almost self-enforcing because clerks may not record property transactions unless a properly filed survey is on record.

Enforcing proper filing and recording procedures can be complex, and in counties that offer the clerk and recorder assistance from the subdivision administrator, sanitarian, county attorney or other personnel, effective enforcement is facilitated.

Transferring title to property without conforming to the surveying or subdivision review requirements can occur by simply failing to record the instruments of conveyance. Recording deeds and other instruments is not a legal requirement so the clerk and recorder might not know about an illegal conveyance of title. At a future date, however, a subsequent purchaser will want to record a deed, and previous violations of surveying or filing requirements will cloud the title.

2. Using the exemptions to divide property where the purpose is to evade the requirements of the MSPA.

The potential for violations relating to misuse of exemptions to evade local subdivision review is largely a function of the criteria and policies of the local government regarding legitimate use of the exemptions. In the absence of any local criteria regarding use of the exemptions, the statutory restrictions must be enforced – one "family transfer" to each member of the immediate family per county, or a proper covenant accompanying an agricultural exemption.

Where the local government adopts evasion criteria or policies, the enforcement function becomes more complex, but can be more precise if clear, specific criteria are adopted and followed. As with the requirements in Category 1, enforcing requirements in Category 2 prevents filing and recording violations because the clerk and recorder may not file a survey nor record an instrument of conveyance that is not in compliance with the statute and local requirements. Potential violations are stopped before they occur. The key, though, is for the local government to adopt clear criteria and to provide the clerk and recorder's office with adequate assistance to properly examine submitted survey documents and instruments of conveyance.

Also, attempting to divide property without obtaining DHES sanitation approval is a potential infraction (this is primarily a function and concern of county health departments and the DHES; the subdivision administrator often can assist in the enforcement of sanitation review).

3. Failing to comply with conditions of preliminary plat approval and terms of final plat approval and improvements agreements.

Infractions can involve the conditions of preliminary plat approval, design and other regulatory standards, conditions of improvements agreement, requirements for selling lots after preliminary plat approval, or filing a final plat after the preliminary plat approval period has expired.

Ensuring that conditions, covenants and other requirements are met after a survey is filed or a preliminary plat is approved can be one of the most important factors in enforcing proper land division and development. Local officials should give close attention to these follow-up actions. Follow-up monitoring of compliance is one of the areas of enforcement in which the subdivision administrator can deal most directly.

B. REMEDIES

1. Administrative Remedies

Administrative remedies are actions that local officials may take to prevent or correct an infraction without going to court. Whenever possible local officials should attempt administrative remedies to avoid the costs and confrontation associated with litigation.

Where filing or recording errors have occurred, those must be corrected by working with the clerk and recorder. Typical problems of this type include filing a certificate of survey with drafting errors, filing a certificate of survey for a land division that was not exempt under MSPA, or recording a deed or Notice of Purchaser's Interest where a required survey is not on file. Seeking the cooperation of the landowner or others affected by the error greatly helps in resolving the problem. The affected parties should be contacted and informed of the error and the recommended means for correcting the mistake.

In some cases the erroneous certificates of survey must be removed from the files, or an improper instrument of conveyance removed from the records. These action's are discussed under the Role and Responsibilities of the County Clerk and Recorder in Part V.

Sound administrative practices often can prevent infractions. This is particularly true of deadlines and conditions specified under final plat approval. Where the subdivision administrator conducts a thorough monitoring program, and keeps updated "tickler files", the landowner or other affected parties can be contacted before expiration dates, deadlines or other critical points occur. Commitments under improvement agreements, deadlines for placing deferred monuments, and expiration of preliminary plat approval are examples of potential violations that often can be prevented administratively.

2. Civil Remedies

Local governments can bring civil lawsuits to prevent or remedy violations of the regulations. Usually civil actions take the form of injunctive procedures initiated by local officials to stop or preclude violations of the MSPA or local subdivision regulations.

Section 76-3-301, MCA, of the MSPA provides the basis for a civil action on violations of proper filing of subdivision plats and transfers of title:

"Every final subdivision plat must be filed for record with the county clerk and recorder before title to the subdivided land can be sold or transferred in any manner. If the unlawful transfers are made, the county attorney shall commence action to enjoin further sales or transfers and compel compliance with all provisions of the Montana Subdivision and Platting Act and these regulations. The cost of such action shall be imposed against the party not prevailing."

These civil actions are filed by the county attorney and can be used in cases of using the exemptions to evade the MSPA, attempting to sell parcels without proper surveying or filing, or failing to comply with conditions or design standards.

Another civil action can be initiated by the county commissioners. Under authority of Section 7-5-2104,MCA, the commissioners can direct the county attorney to file for a declaratory judgement where there is a question whether a particular land division is a "subdivision," and in other cases involving unresolved questions of law. A declaratory judgement is a court opinion on a question of law or constitutionality, usually upon request, where the court does not order any action by affected parties. Municipalities also can pursue criminal remedies under Section 7-5-4207, MCA.

Municipalities can initiate civil suits to enforce their subdivision regulations under Section 7-1-4124, MCA. These civil actions can be brought for circumstances within the city limits that do not comply with the city municipal subdivision regulations or conditions and improvements agreements specified during the approval process.

3. Criminal Remedies

Although civil remedies are the most common means of dealing with violations, criminal remedies also can come into play.

Section 76-3-105, MCA, of the MSPA provides the authority for criminal remedies:

"Any person who violates any provision of this chapter or any local regulations adopted pursuant thereto shall be guilty of a misdemeanor and punishable by a fine of not less than $100 or more than $500 or by imprisonment in a county jail for not more than three months or by both fine and imprisonment. Each sale, lease, or transfer of each separate parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto shall be deemed a separate and distinct offense."

C. RECORDS AND MONITORING: VITAL FACTORS IN ENFORCEMENT

A vital part of enforcing the subdivision law and regulations is keeping careful records and monitoring the efforts of subdividers to meet the conditions specified in approvals and agreements.

The subdivision administrator can prevent many future misunderstandings and potential problems by keeping accurate records of meetings, site inspections and contacts with the subdivider. Any verbal understandings should be recorded and later written as a memorandum to be included as part of the file. Where times, dates, and critical points of meetings and conversations are on file, the opportunities for misunderstandings can be greatly reduced. Factors such as telephone calls, inquiries about dates of meetings, or requests for information may seem routine and unimportant at the time. However, records of these communications can be valuable support if the subdivider claims he was not notified or was not informed about an aspect of the process.

Records of times and dates and findings of site inspections to monitor progress of the subdivision after approval can be very important. The records can benefit the subdivider and his contractors by letting them know of deficiencies and facilitating corrections. Should the subdivider challenge the subdivision administrator's enforcement efforts, either before the planning board and governing body or in court, the records will be vital. Where a subdivision violation may go to court, the subdivision administrator's records can be subpoenaed.

Typically, the subdivider is required to meet a number of conditions and terms as part of the approval of the subdivision. Monitoring compliance with those requirements is a necessary part of enforcement.

Monitoring is one aspect of administering subdivision regulations that the subdivision administrator can perform directly. The subdivision administrator needs to have a file (often called a "tickler file") that sets out deadlines and the dates appropriate for checking progress of a subdivision. In many cases the required improvements will be part of water or sewer systems and the subdivision administrator would want the sanitarian to help monitor the installation. The subdivision administrator might want the county road supervisor or county engineer to help inspect construction of roads, culverts, bridges and drainage swales.

In addition to checking and monitoring compliance with the design standards, conditions set forth by the governing body, and construction of specified improvements, the subdivision administrator will want to keep track of the date on which the preliminary plat approval expires.

The "Uniform Standards for Monumentation" allow the surveyor to defer placing monuments in subdivisions where future construction of roads or other facilities would disturb the monuments. Although enforcing the "Uniform Standards" is a responsibility of the county clerk and recorder, the subdivision administrator can assist the county clerk by keeping a record of the deadline for placing the deferred monuments and by inspecting to ensure that the monuments are properly and timely placed by the surveyor.

D. THE ROLE OF THE SUBDIVISION ADMINISTRATOR

For two reasons, the subdivision administrator is a critical person in enforcing the statutes and requirements relating to land division. First, the subdivision administrator usually is more concerned than virtually anyone else about effective enforcement. Second, the subdivision administrator usually is more familiar with each subdivision and land division than anyone and has followed each project from inception to completion. Because of the subdivision administrator's concern and knowledge he or she is in the best position to identify infractions or deficiencies and begin the process of correcting the problems.

The subdivision administrator's responsibility for monitoring and follow–up inspections, and for keeping detailed, accurate records relating to deadlines, conditions, and terms of approval, and to discussions, conversations, meetings and site inspections has already been emphasized.

Once the subdivision administrator identifies a deficiency or violation, he should make a written record and contact the developer or his appropriate agent (e.g., surveyor or engineer). Many times notifying the developer will be enough to correct the problem. If notifying the developer does not result in rectifying the problem, the subdivision administrator needs to submit a memorandum to the planning board, governing body and county or city attorney. The memorandum should include the date and time of site inspection (or other place that the violation was found), the specific deficiencies or violations and the means by which the problems can be corrected.

Depending on the procedural policies of the local government, the governing body or the county attorney must notify the developer of the problems and that the governing body believes that the problems are serious enough to warrant legal action if they are not corrected.

The subdivision administrator will want to discuss with the county or city attorney what legal remedies the local government will pursue. Some county or city attorneys resist the involvement of the subdivision administrator in legal actions. The subdivision administrator can help overcome that barrier by indicating that he is not "playing lawyer" but can discuss in detail the nature of the particular violations. Detailed knowledge of the appropriate regulations and the history of the particular development and the infractions will assist the attorney in preparing for the legal action.

E. THE ROLE OF THE COUNTY CLERK AND RECORDER

Because the county clerk and recorder has responsibility under the MSPA for enforcing filing and recording requirements much of the activities surrounding compliance with subdivision regulations occur in that office. The clerk must refuse to file improper survey documents or to record instruments that do not refer to properly filed surveys. Thus, violations of filing and recording requirements are prevented from actually occurring.

Whenever the county clerk and recorder is involved in a court action, it is usually as the defendant, rather than as the plaintiff.

Occasionally the clerk and recorder may inadvertently file or record an improper document. These problems most often relate to filing a certificate of survey that was not exempt from local subdivision review, or recording a deed or other conveyance that did not refer to a required survey on file.

The Attorney General (38 Op. Atty Gen. 106, 1980) ruled that improperly recorded instruments of conveyance can be voided by the governing body. The governing body or city or county attorney can make a written directive to the clerk and recorder to void a particular instrument. The clerk would note in both the Grantor and Grantee books that the conveyance was voided.

An improperly filed certificate of survey usually is removed from the records by removing all copies of the certificate of survey and all copies of accompanying documents. The clerk and recorder notes in the reception book and the tract index that the certificate of survey was voided and removed. The county attorney would initiate the action by submitting a written directive to the county clerk.

Removing a certificate of survey from the clerk and recorder's records will affect any deeds or contracts for deeds that refer to that certificate of survey. An improperly filed certificate of survey should be removed as early as possible to avoid the problems associated with subsequent transfers of title to the involved parcels.

F. THE ROLE OF THE COUNTY OR CITY ATTORNEY

Civil and criminal remedies require the county or city attorney to file the necessary legal documents to initiate and process the legal action. The attorney needs to have a thorough understanding of the MSPA, local subdivision regulations and their history, and the pertinent Attorney General opinions and court cases relating to subdivision regulations and enforcement.

G. RELATIONSHIP BETWEEN THE COUNTY OR CITY ATTORNEY AND THE SUBDIVISION ADMINISTRATOR

The subdivision administrator needs to keep the attorney informed of existing or potential problems relating to enforcement of state and local subdivision regulations. While the best solution is to work with the developer to correct problems without legal action, the county or city attorney will be better prepared both to prepare a case and to offer legal advice prior to filing a legal action if he has been kept aware of the circumstances surrounding subdivision problems. The subdivision administrator's records and files pertaining to the affected subdivision will be of great value.

The attorney can assist the subdivision administrator by providing information on how the infractions can be remedied. Often the subdivision administrator can use that information to work out a solution with the developer without legal action. Also, the attorney can inform the subdivision administrator of information that will be needed and the administrator can begin obtaining the needed data.

Ideally, the attorney and the subdivision administrator work cooperatively in preparing a case for subdivision enforcement. Appendix O contains an outline of information needed for preparing a legal case involving a subdivision violation. It was developed by Jean Wilcox, former Deputy County Attorney in Missoula County.

H. CITIZEN COMPLAINTS

Both the subdivision administrator and the county attorney may receive citizen complaints regarding a subdivision or land development. These complaints can be investigated through site inspections, documentation of findings, examining the files and records, and discussions with the developer.

Careful records of the site visits and other steps taken in the investigation must be kept for possible use in future court actions.

The subdivision administrator, planning board, governing body, and city or county attorney may want to work together to develop local policies or guidelines for following up on citizen complaints.

Part V – Clerk and Recorder Responsibilities

Part V – Clerk and Recorder
Responsibilities

PART V ROLE AND RESPONSIBILITIES OF THE COUNTY CLERK AND RECORDER

The clerk and recorder is one of the key persons in the operation of the Montana Subdivision and Platting Act (MSPA). Because certain final decisions are made in that office, the clerk is vital to enforcement of the act.

The clerk and recorder's responsibilities for filing and recording are complicated by the fact that the office can be held liable for up to three times the amount of the damages incurred for failure to file or record documents that should be filed or recorded. That provision becomes significant because the clerk and recorder must make many decisions about the propriety of filing or recording certain land records.

Under the MSPA the clerk and recorder's responsibilities with regard to land records (or at least the MSPA) can be divided into 3 major functions:

- Filing subdivision plats
- Filing certificates of survey
- Recording deeds and other documents of land title conveyance

In carrying out each of these functions the clerk and recorder has various degrees of discretion that affect administration of the county land records.

Appendix E, "A Key to Filing Requirements of the Montana Subdivision and Platting Act and the Montana Sanitation is Subdivisions Act," will assist the clerk and recorder in checking plats and certificates of survey for filing.

A. FILING SUBDIVISION PLATS

As has been discussed, final subdivision plats are the documents prepared for filing that show surveys of land divisions that the MSPA requires to be reviewed by the local governing body as "subdivisions."

In most courthouses those plats are maintained in a separate "plat file," which varies in form from county to county, but may consist of a set of plat books, or may be maintained in hanging files or some other system that allows ready public access while protecting the plats themselves from excessive wear and tear.

In some offices of the clerk and recorder, plats are filed in the same file as certificates of survey. Because of the difference in meaning and purpose between certificates of survey and subdivision plats, it is important to be able to distinguish easily between plats and certificates of survey that are filed together in the same filing system.

Historically, plats, as surveys of lots and blocks and townsites, have had a meaning different from that of certificates of survey. A certificate of survey is a record of a field

survey. A plat, on the other hand, is a record not only of the field survey, but also of information relating to dedications, facilities, improvements and other information regarding the development.

1. Plat Submitted for Filing

As with any land record, the clerk and recorder must ensure that a subdivision plat submitted for filing meets the plat filing requirements. Major elements of those requirements include: (1) approval of the plat by the local governing body under the MSPA and local subdivision regulations, (2) certification of approval for sanitation facilities by the DHES under the MSIS for lots less than 20 acres in size, (3) certification by the county treasurer that no real property taxes are delinquent, and (4) the plat's compliance with the "Uniform Standards for Final Subdivision Plats." The "Uniform Standards" specify drafting requirements and information that must be shown on the face of the plat, and the certifications and accompanying documents that must be filed with the plat.

With regard to approval of the subdivision the county clerk must only ensure that the governing body has certified that the subdivision has been approved, and that the certification from the DHES, where necessary, accompanies the final plat. The process of final plat review and approval usually ensures that accompanying documents and certifications have been obtained and that the plat is in compliance with the "Uniform Standards."

Although plats are approved by the governing body the clerk and recorder still is responsible for ensuring that the plat is in proper order for filing. Most clerks use a checklist to assist in checking compliance with the many detailed filing requirements [see Appendix E, A Key to Filing Requirements of the Montana Subdivision and Platting Act and the Montana Sanitation in Subdivisions Act].

Two copies of the plat must be submitted: one copy on cloth– backed material or opaque mylar, and one reproducible copy on a polyester or mylar material. The cloth–backed or opaque mylar represent the "original" copy that is durable and is filed in the plat book or other file as a permanent record available to the public. The reproducible copy often is kept separately and is used to make copies on request. Some clerks and recorder file the reproducible and the cloth–backed copies together in hanging files. Other county clerks send the reproducible copies to the county appraiser for filing in that office.

The requirements for drafting the graphics and depicting the survey monuments, lot lines and other features are detailed but each serves an important purpose for future use by the public, surveyors, lot buyers, local officials and others. A policy of retaining an examining land surveyor greatly assists the clerk in ensuring those requirements are met. Avoiding errors in survey documents saves future expense and inconvenience.

The "Uniform Standards for Final Subdivision Plats" specifies the required certifications. Two of the certifications must appear on the face of the plat, (1) the signature and seal

of the registered land surveyor responsible for the survey, and (2) the certification of subdivision approval by the governing body – usually the signature of the mayor or chairman of the county commissioners.

The following certifications are required by the "Uniform Standards for Final Subdivision Plats" and are submitted as accompanying documents:

- DHES's Certificate of Subdivision Plat Approval;
- Abstract of title by licensed title abstractor;
- Letter from county treasurer that no taxes on property are delinquent;
- Certification by examining land surveyor, where applicable;
- Dedication of streets, parks, playgrounds or other improvements, or donation of cash in lieu of park land;
- Acceptance of dedication by governing body;
- Subdivider's indication of which required improvements have been installed and a copy of any improvements agreement; and
- Professional engineer that improvements have been properly installed.

In addition, the following documents must accompany the plat:

- Copies of any covenants and deed restrictions relating to public improvements;
- Copies of final plans, profiles, grades, and specifications for improvements;
- Copies of any articles of incorporation and by–laws of property owners' association;
- Department of Transportation permit for approaches onto highways.

Section 7–4–2619, MCA, requires the clerk and recorder to maintain an index of filed subdivision plats. That index, often referred to as the "tract index," must contain the number of lots, the number of acres, filing date, and location of the quarter section of each subdivision. The "tract index" is organized by section, township and range. Most clerk and recorders also keep a separate plat index that is kept in the chronological order plats are submitted for filing. In many clerk's offices an alphabetical index by subdivision name also is maintained.

B. FILING CERTIFICATES OF SURVEY

Dealing with certificates of survey is more difficult for the clerk and recorder than filing subdivision plats or recording instruments of conveyance. The filing requirements for final plats are detailed but straight forward. In addition, plats are reviewed and approved by the governing body (usually after subdivision administrator and planning board review) and should be in compliance with the "Uniform Standards." Deeds, contracts for deeds and other conveyances are recorded according to fairly clear requirements.

Certificates of survey, on the other hand, can require many, and complex, decisions on proper filing. Under the MSPA, there is much discretion in defining what surveys may

be filed as certificate of surveys. Depending on the local policies, procedures and criteria adopted by the county commissioners, the clerk and recorder often must determine whether a certificate of survey may be filed within vaguely defined guidelines. That vague direction can be especially confusing in dealing with the exemptions from subdivision approval.

The clerk and recorder in counties where the governing body has not adopted policies regarding filing of certificates of survey and exemptions must rely on the language of the MSPA. Clerk and recorders in counties with criteria and policies should have better guidance of what surveys can properly be filed as a certificate of survey.

Part III of this Manual discusses certificates of survey in detail and offers assistance to the clerk and recorder.

1. Submittal of a Certificate of Survey for Filing

When a certificate of survey is submitted for filing, the clerk and recorder faces three major issues:

- Whether the land division is eligible to be filed as a certificate of survey, or must be reviewed as a subdivision and filed as a subdivision plat (usually the most troublesome of the three issues);
- Whether the land division requires DHES approval under MSIS; and
- Whether the certificate of survey meets the Uniform Standards for Certificates of Survey.

2. Checking Eligibility of Certificate of Survey for Filing

The first issue facing the clerk and recorder is determining whether the submitted certificate of survey may be filed as a certificate of survey, or must be filed as an approved subdivision plat.

Surveys creating parcels 160 acres or larger pose no problem in deciding: certificates of survey are proper, although parcels that can be described as consisting of 1/32 or larger aliquot parts can be conveyed without a survey by description on a deed or other instrument of conveyance.

The difficulty arises with parcels smaller than 160 acres – the threshold parcel size that defines a "subdivision." Section 76-3-207, MCA, sets out land divisions that require a survey, but do not require local governing body approval. The four exemptions pertaining to tracts outside of platted subdivisions include: relocation of a common boundary, gift or sale to a member of the immediate family, and a division for agricultural purpose. These divisions may be filed as certificate of surveys. Where parcels are exempt from

subdivision review as a family transfer, relocation of a common boundary line, or for an agricultural purpose and can be described as 1/32 or larger aliquot parts of a section, they can be created without a survey by description on a deed or other instrument of conveyance.

The fifth exemption from local subdivision review – relocation of boundaries or aggregation of five or fewer lots within a platted subdivision [76-3-207 (1) (e), MCA] – must be filed as an amended plat under provisions of the "Uniform Standards for Final Subdivision Plats."

The exemptions in Section 76-3-201, MCA, do not require surveying, but the landowner frequently has the parcels surveyed and submits a certificate of survey. Those exemptions include parcels created: (1) under court order or operation of law, (2) under the laws of eminent domain, (3) as security for construction mortgage, (4) to sever an interest in oil, gas or minerals, (5) as a reservation of life estate, 6) for lease as agricultural land and (7) for cemetery lots. Of these exemptions the clerk and recorder will most commonly encounter a certificate of survey showing the exemption for security for a construction mortgage.

On rare occasions a certificate of survey may be filed by the Montana Department of State Lands under Section 76-3-205, MCA.

The specific items a clerk and recorder must look for in determining whether a particular exemption can be used are discussed in Part III of this Manual. For each exemption, the specific requirements of the MSPA, Uniform Standards for Certificates of Survey, and Attorney General opinions are explained. Also, the common requirements of county evasion criteria are discussed. In addition, the Department of Commerce has published A Guide to the Exemptions in the Montana Subdivision and Platting Act.

Locally adopted evasion criteria and policies regarding filing or exemptions can greatly assist the clerk and recorder by making more clear what circumstances make the use of an exemption ineligible for filing as a certificate of survey. Specific guidelines provided by well-drafted evasion criteria and certificate of survey filing policies can greatly help the clerk by reducing the discretion and need for judgement. If a county has not adopted local criteria or policies for handling certificates of survey and use of the exemptions, the clerk and recorder may want to urge the county commission to develop and adopt standards to guide filing decisions.

Enforcing proper filing requirements works best where the subdivision administrator, sanitarian, county attorney or other personnel assist the clerk and recorder in reviewing certificates of survey.

A review team comprising key local officials can help ensure a coordinated examination of certificates of survey. Also, county policies that require the county attorney, or better, a review team, to approve a certificate of survey for filing can buffer the clerk and recorder from pressure to file a submitted certificate of survey.

Because the Supreme Court (*Swart v. Stucky*, 167 Mont. 164, 1975) has held that certificates of survey may not be delayed in filing for planning board review, the subdivision administrator or review team must conduct the review promptly.

3. Determining Whether DHES Approval is Required

For the most part, certificates of survey that need DHES approval of sanitation facilities primarily will be those that show land divisions under the exemptions for a gift or sale to a family member.

A clerk and recorder could encounter a certificate of survey that shows an exemption as a relocation of a common boundary line and the landowner desires to construct a dwelling or other structure requiring water or sewer facilities on the land to be added to a larger parcel. Such a certificate of survey would require DHES approval.

Occasionally a surveyor will submit a certificate of survey to file the relocation or aggregation of five or fewer lots within a platted subdivision. While the language of the MSPA does not specify what type of survey document is required to be filed, the "Uniform Standards for Final Subdivision Plats" specify that an amended plat is the proper instrument to be filed. The Uniform Standards require filing changes to a plat as a plat amendment and maintaining the amendment in the plat file to allow ready tracking of changes to lots in platted subdivisions. Although local governing body approval of the amended plat is not required, the "Uniform Standards" require that a statement of waiver be placed on the face of the amended plat.

A parcel created under the agricultural exemption must receive DHES approval if converted to a non-agricultural use. Usually the conversion is filed as a subdivision plat but in some counties the conversion may be filed as a certificate of survey.

4. Determining Compliance with the Uniform Standards

The requirements set forth in the Uniform Standards are clear and specific. A checklist helps a clerk and recorder assure that a certificate of survey meets the drafting requirements and has the proper accompanying documentation. As with final plats, the county is authorized to engage an examining land surveyor to review the surveying and drafting aspects. Assistance from the subdivision administrator and sanitarian can help check these detailed requirements.

5. Facing Pressure

One trying aspect of the clerk and recorder's responsibilities for filing certificates of survey is dealing with people involved in dividing land. Some surveyors, attorneys, and developers, can be very strident and persistent in trying to persuade clerk and recorders to file certificates of survey.

A clerk and recorder should not be intimidated by pressure to file a certificate of survey. A reasonable amount of time (e.g., one to two weeks) may be taken to determine whether a survey may be filed as a certificate of survey. Thoroughly checking a certificate of survey for its propriety will avoid later difficulties associated with filing of an improper survey.

The clerk should take a courteous but firm position. Written criteria and procedures and "sign off" by the county attorney or review team offer a clerk and recorder the best protection against undue pressure.

C. RECORDING DEEDS AND OTHER INSTRUMENTS OF CONVEYANCE

Deeds and contracts for deed are the most common documents that convey title to land from one person (the grantor) to another (the grantee). Upon submittal the clerk and recorder makes a record of the document and returns the document to the person requesting the recording.

Usually a contract for deed is represented by a Notice of Purchaser's Interest, a document that declares that a grantee has entered into a contract with the grantor to purchase a property. The grantee submits the Notice of Purchaser's Interest to the clerk and recorder for recording.

The clerk and recorder makes a record of the instrument in two books or indexes, the Grantor Book and the Grantee Book. The clerk records the transaction in chronological order as each is submitted for recording. The description of the property, grantor, grantee, type of instrument, date of recording are entered into both the Grantor Book and the Grantee Book.

The important factor that the clerk and recorder must consider is whether the instrument of conveyance is required to refer to a filed certificate of survey or subdivision plat. If the conveyance is for a portion of an existing tract, the instrument must refer to a filed certificate of survey or subdivision plat unless the property can be described by reference to an aliquot part of a section [see diagram on page I–14], or is exempt from surveying requirements under Section 76–3–201, MCA of the MSPA.

The instrument conveying a parcel must describe the parcel or lot by reference to the parcel number on a filed certificate of survey, or to lot and block of a subdivision plat.

Certificates of survey are given a number when filed; plats are filed by the name of the subdivision. For example, a deed would describe a conveyed property as Parcel A of Certificate of Survey #2406; or in the case of a subdivision lot, as Lot 3, Block 2, of the John Doe Subdivision.

The clerk and recorder may not record a deed or other document conveying title to property unless the proper filing requirements are met.

Instruments transferring title to entire tracts or tracts that can be described by reference to aliquot parts of a section may be recorded without reference to a filed survey document.

[See Appendix D for an overview of basic filing and recording procedures and land records used in Montana.]

[See Part IV ENFORCEMENT for discussion on removing improperly recorded instruments, or removing improper certificates of survey or subdivision plats from the file.]

Appendices

APPENDIX A

A SHORT HISTORY:

THE MONTANA SUBDIVISION AND PLATTING ACT
and
THE MONTANA SANITATION IN SUBDIVISIONS ACT

1. The Montana Subdivision and Platting Act

The Montana Subdivision and Platting Act (MSPA) was passed by the Montana Legislature in 1973. The bill was introduced and passed in reaction to widespread public awareness that the existing platting law, Plats of Cities and Towns, (Title 11, Chapter 6, R.C.M.) was not sufficiently addressing the problem of unplanned and haphazard development.

Very few cities and counties were enforcing local subdivision regulations in the early 1970's. However, significant growth in western Montana between 1960 and 1970 coupled with energy- related development in eastern Montana sparked an interest in land use planning and more effective subdivision regulation.

As passed by the 1973 legislative session, the MSPA defined a "subdivision" as land divisions creating two or more parcels of 10 acres or less, mobile home parks, recreational vehicle parks and condominiums. The act mandated that all municipalities and counties adopt local subdivision regulations by July 1, 1974. The statute directed the Planning Division of the Department of Community Affairs to promulgate local regulations for those local governments that did not adopt their own.

The Planning Division also was directed to adopt administrative rules that specified minimum requirements for local regulations, and uniform standards governing survey monumentation, certificates of survey and final subdivision plats.

In the 1974 Legislative session a number of significant amendments were made. The definition of parcels qualifying as a "subdivision" was changed to include parcels less than 20 acres in size. The definition of a "subdivision" was changed from "two or more parcels" to "one or more parcels. This important change had the effect of eliminating the "free split" that the 1973 version of the MSPA provided. Clerks and recorder joined other local officials in opposing the "free split" provision because of the difficulty it presented for land record keeping.

Unfortunately, the public benefit of eliminating the "free split" was greatly overshadowed by the enactment of a new exemption -- one "occasional sale" from a tract during any 12 month period. That one exemption was the single most troublesome provision of the MSPA, and coupled with the 20 acre limit in the definition of "subdivision" severely limited

the effectiveness of the subdivision law in the 20 years between 1973 and 1993, the year major legislative changes were made as described below.

The requirement for finding whether a subdivision is in the public interest based on eight criteria was enacted in 1975. The public interest provision required local officials to give much broader consideration to the elements of subdivision approval than simply determining whether a subdivision conformed to platting requirements and design standards.

The 1975 Legislature funded a legislative interim study committee to study the state's subdivision statutes and recommend legislation. The bipartisan interim committee reached agreement on recommended changes to the MSPA. The committee's bill failed in the 1977 legislative session. Bills similar to the committee's 1977 recommendation were introduced in three of the subsequent sessions after 1977, but always were defeated.

The role of the state was dramatically reduced in the 1981 Legislature. The administrative rules setting minimum requirements for local subdivision regulations were eliminated and replaced by statutory requirements in the MSPA. The Department of Commerce still is mandated to adopt administrative rules governing uniform standards for surveying, certificates of survey and final subdivision plats.

In 1984 the Attorney General issued two opinions that subjected apartments and even duplexes to local subdivision review. The 1985 Legislature, believing that reviewing duplexes and apartment buildings as "subdivisions" was not appropriate, amended the MSPA to eliminate apartments from local review.

In 1985 the Legislature also passed House Bill 791, which required local government to determine whether access to parcels 20 acres or larger were suitable to provide local services. In those cases where the governing body determined that the access is suitable, it provides a statement of suitability to be filed with the certificate of survey or deed. If the governing body determines that the access is not suitable to provide local services, it files a statement of unsuitability and the affected local jurisdictions will not provide fire protection, ambulance service, snow plowing, or other similar services. House Bill 791 was later repealed by the Legislature.

Legislation passed in the 1993 Legislature made a number of significant changes to the MSPA. The 20-acre definition of "subdivision" was changed to 160 acres; the occasional sale exemption was eliminated, and the use of the family conveyance exemption was restricted to a "one-time only" transfer of land in each county to each member of the immediate family; the requirement for a finding that a subdivision was in

the public interest was deleted, but the requirements for subdivision approval were expanded:

- The eight public interest criteria were changed to five review criteria – effects on agriculture, local services, wildlife and wildlife habitat, the natural environment and public health and safety.

- The subdivision must conform to the MSPA, the surveying requirements of the MSPA, and the procedures and requirements of local subdivision regulations.

- Easements for the location and installation of any planned utilities must be provided.

- Legal and physical access to each parcel within the subdivision must be provided, and a notation of that access must be shown on the plat and any instrument of transfer.

2. The Montana Sanitation in Subdivisions Act

The first statute regulating water supply and sewage treatment in subdivisions was enacted in 1961. The impetus for the law came from the Billings area where septic systems were contaminating wells. The law applied to divisions of land creating five or more parcels, any of which were less than five acres in size, along an existing or proposed street or right-of-way.

The act allowed the county clerk and recorder to file plats or certificates of survey after stamping a notice on the document that sanitary restrictions were placed on the parcels. Imposing the sanitary restrictions meant that no building or structure requiring water or sewage or solid waste could be built on parcels until the owner had the sanitary restrictions lifted by the Montana Board of Health. The owner had to provide design plans for water, sewer and solid waste facilities. The department reviewed the plans under rules it had promulgated, and lifted the restrictions if the design and plans were satisfactory.

The law was ineffective because it (1) allowed surveys creating parcels to be filed whether or not satisfactory sanitation facilities could be constructed, (2) placed the burden of satisfying sanitation requirements on the lot purchaser rather than the subdivider, and (3) allowed developers to avoid Board of Health review by creating land divisions with fewer than five parcels at a time.

In 1967 the Legislature changed the statute to subject all parcels less than five acres in size to sanitary restrictions.

The 1973 Legislature made major amendments. The DHES was required to approve the sanitation facilities before the certificate of survey or plat could be filed, lots sold, or any dwellings erected. Any division of land creating two or more parcels, any of which were 10 acres or less, were subject to review. Condominiums, mobile home and recreation vehicle parks also were subject to review. The 1973 amendments renamed the statute the "Montana Sanitation in Subdivisions Act."

Also in 1973 the DHES changed its administrative rules. The most significant rule change set a minimum size requirement of one acre for lots with both individual water and sewer systems. The rules also set slope restrictions for hillside lots with septic drainfields.

The legislature made several profound changes in 1975. The acreage definition was increased to include all parcels containing less than 20 acres. Perhaps more significant was changing the definition to include land divisions creating one or more parcels of less than 20 acres. By changing the language from "two or more parcels" to "one or more parcels" the Legislature brought the "occasional sale," "family transfer" and other MSPA exemptions under DHES sanitation review. The DHES also was allowed to charge a review fee of up to $15 per lot.

The DHES workload escalated with the 1975 changes. Between 1976 and 1979 the number of applications nearly tripled from 1040 to 2944. Over 40,000 lots were reviewed during that time period. The DHES formed a separate Subdivision Bureau to administer the MSIS. The Bureau operated from 1975 until 1981, when inadequate funding forced the DHES to close out the Subdivision Bureau. Since that time the MSIS has been administered by the Water Quality Bureau.

A significant amendment in 1977 changed the wording in the MSIS from "one or more parcels segregated from the original tract" to one or more parcels created by a division of land." This change meant that not only are parcels created as "occasional sales" and "family transfers" exemptions subject to DHES review, but so are any parcels less than 20 acres that remain after use of exemptions.

Another important exemption was added in 1977: land divisions within areas covered by an adopted comprehensive plan do not need DHES review if a local government certified to the DHES that adequate water, sewer and solid waste facilities are available to serve the development or would be within one year. That exemption was expanded in 1985 to include Class 1 and 2 municipalities and to exempt condominiums as well as land divisions.

In 1985 local governments were given the opportunity for greater responsibility in sanitation review. The MSIS was amended to authorize local health departments that DHES certified as qualified to review and approve land divisions (1) containing five or fewer parcels that will use individual on-site water and sewer facilities, and (2) that will connect to existing public water and sewer systems where no system extensions are needed.

APPENDIX B

SUBDIVISION REVIEW UNDER THE MONTANA SANITATION IN SUBDIVISIONS ACT

A. GENERAL OPERATION OF THE MONTANA SANITATION IN SUBDIVISIONS ACT

The Montana Sanitation in Subdivisions Act (MSIS) requires review of the water supply systems, sewer, sewage disposal and treatment, solid waste disposal and storm water management systems. For large subdivisions (50 or more lots) or subdivisions in fragile environmental areas an environmental evaluation is also needed. This evaluation can take the form of a Preliminary Environmental Review (PER) or Environmental Impact Statement (EIS).

Until the subdivision review is completed and an approval statement (Certificate of Subdivision Plat Approval) issued, the developer may not construct or install any portions of the sanitation facilities. It is illegal to erect any building requiring water or sewer before the approval statement has been issued.

Application Form

The DHES/Local Government Joint Application form is used to apply for approval of major subdivisions under the MSIS. This form was developed by the Montana Department of Environmental Sciences (DHES) and the Department of Community Affairs (now Department of Commerce) to give developers the option of concurrent review by the DHES and local government. Concurrent review can speed the approval processes, but in practice it can be expensive. To trigger concurrent review, the developer must invest money in engineering design before applying for DHES approval. Most developers do not wish to hire an engineer to design the sanitation facilities before they know whether the local government will approve their subdivision.

While developers rarely request concurrent review, the Joint Application Form is still widely used. The DHES has another application form for major subdivisions, the SUB 1 Form, which is very similar to the Joint Application Form. The DHES uses a SUB 2 form to apply for sanitation approval of certificates of survey and minor subdivisions.

Required Information

Section 16.16.104 of the Administrative Rules of Montana (ARM) specifies the information that must be submitted as part of the application. Basically, the design plans for the water supply system, sewage disposal and treatment system, storm water drainage system, and solid waste disposal systems is required.

A licensed engineer must design public systems. Individual or shared systems usually do not require an engineer, but engineers, with other professionals such as planners, sanitarians, surveyors, and soil scientists, frequently are retained to assist with the design.

A review fee must be submitted with the application. The review fee is established on a per lot basis, as set forth in Section 16.16.803 ARM.

Review Procedure

Upon receipt of an application the DHES (or in certain cases the local health department) has 60 days to act. If an EIS is required final action must be taken within 120 days.

If the application is incomplete the review agency will deny the application, explain the deficiencies to the developer or his engineer and invite them to resubmit when the additional information is available. When an application is resubmitted the 60 or 120 day review period begins.

The 1985 Legislature authorized the Water Quality Bureau of the DHES to delegate review authority and responsibilities to local health departments that have the expertise and desire to operate the MSIS review. The law limited local health department review authority to land divisions containing five or fewer parcels using individual water and sewer systems and to parcels connecting to municipal water and sewer systems where no extensions are required.

One confusing aspect of the review process is the fact that the law requires both the DHES and local health departments to approve a subdivision before an approval statement can be issued. The exception to the two party approval occurs in those jurisdictions which have been delegated approval authority by the DHES.

Sanitation Approval

The review agency cannot issue a Certificate of Subdivision Plat Approval until the following requirements have been met:

1. The water source must be adequate to meet quantity and quality standards, meet the demands of the subdivision and not deplete the supply of the existing neighbors;

2. The water conveyance system must be sized to provide an adequate quantity of water to each lot at a pressure of at least 35 pounds per square inch. Potential purchasers should be made aware of the limits of the water systems. Some water systems are designed for domestic use only, and no water is available for irrigation.

The potential purchasers also should be informed about the limits of the fire protection capabilities of the water system. The buyer should know whether the systems will provide full fire flows as established by the state fire marshall, or if the system merely provides a reservoir for use by fire trucks.

3. The sewer mains must be designed to convey the quantity of sewage from the source to the treatment facility;

4. The sewage treatment system must be capable of treating the sewage and disposing of it in a manner that will not contaminate existing or future drinking water or groundwater and will not cause odors or other nuisance. In general, the review agency must be certain that the system will not create a public health hazard.

5. Solid waste must be disposed of properly, including assurance of proper collection and disposal at a suitable disposal site.

6. The storm water must be controlled and prevented from contaminating the water system or damaging the sewage treatment system. Runoff must not be allowed to pond on neighboring property or to degrade state waters. The storm water conveyance system must be designed to handle the two year–six hour storm.

7. The human and physical environment must be assessed.

When the review agency is satisfied with the information it will issue a Certificate of Subdivision Plat Approval. That document is filled along with the survey.

B. EXEMPTIONS FROM REVIEW UNDER THE MONTANA SANITATION IN SUBDIVISIONS ACT

Parcels 20 acres and larger do not require sanitation review under the Montana Sanitation in Subdivisions Act (MSIS). There also are certain parcels less than 20 acres in size that are exempt from sanitation review under MSIS. Under Section 76–4–125(1), MCA, the law specifically exempts the land divisions exempted under Section 76–3–201, MCA of the Montana Subdivision and Platting Act (MSPA):

(1) created by a court order or operation of law, or could be created under the law of eminent domain;
(2) created to provide security for construction financing;
(3) created to sever interest in oil, gas, minerals or water from surface ownership;
(4) created for cemetery lots;
(5) created by reservation of a life estate;
(6) created by lease or rent for farming or agricultural purposes

The MSIS exempts the conveyances of one or more parts of a building, structure or other improvement (which are exempt under Section 76-3-204 of MSPA), but does not exempt condominiums prior to construction.

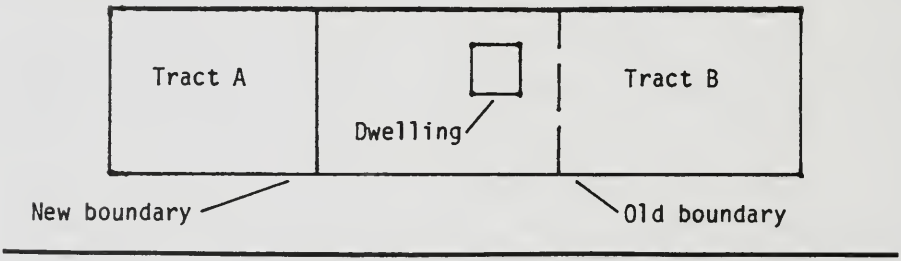
Section 76-4-125(2) of the act also exempts:

"(b) divisions made for the purpose of acquiring additional land to become part of an approved parcel, provided that no dwelling or structure requiring water or sewage disposal is to be erected on the additional parcel and that the division does not fall within a previously platted or approved subdivision; and

(c) Divisions made for purposes other than the construction of water supply or sewage and solid waste disposal facilities as the department specifies by rule."

The exemption in Subsection (b) above covers relocation of boundary lines, but if structures requiring water or sewer facilities will be built on the land that is added to a parcel, sanitation approval is required. Sanitation approval also is required if the boundary relocation occurs in a platted subdivision or a land division that received previous DHES approval.* [See diagram and explanation below].

Diagram: Boundary Relocation with Dwelling



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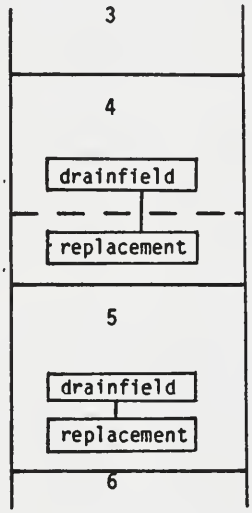
* Sanitation approval is not required if the parcels are located within a master planned area or in Class 1 and 2 cities, the parcels are served by municipal water and sewer, and no extensions of lines are proposed.

Subsection 76-4-125(2)(b) of the MSIS requires DHES approval if the divisions are within previously platted subdivisions or land divisions approved by DHES. The reason for requiring approval in such cases is to avoid potential disruptions of approved water or sewer systems in an approved subdivision lot. The following illustrates the problem:

Each lot in this diagram has had DHES approval of suitable sites for a septic drainfield and drainfield replacement area. If the proposed addition is made to Lot 5, the owner of Lot 4 no longer has a parcel with suitable sites for a drainfield and drainfield replacement, and it would not comply with the DHES approval. Boundary relocations have the potential of reducing parcels below the minimum size necessary to receive sanitation approval.



To implement Subsection (c), DHES has adopted an administrative rule (ARM 16.16.605) exempting the following land divisions:

1. Divisions made for agricultural or pasture use when no structures requiring water or sewage facilities have been or will be built or used, provided the landowner enters into a covenant running with the land and revocable only by consent of the governing body;

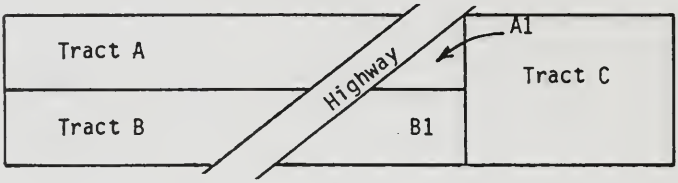
2. Divisions made to correct errors in construction where a building or shrubs may encroach upon neighboring property;

3. Divisions made for convenience when a highway relocation separates a portion of a tract from the original tract, making it more desirable for the property to be sold to become part of a contiguous tract, or if sufficiently large, as an individual tract; [see diagram on following page]

4. Boundary relocations involving five or fewer lots in a platted subdivision when the lots are served by existing public water and sewer systems;

5. Parcels used for utility sitings, easements, parking lots, parks, gravel pits and ski lifts, provided no structure requiring water supply or sewage disposal will be erected on the parcel.

Diagram: Exemption for Highway Separation



In this example Parcel A1 and Parcel B1 have been separated from original tracts A and B by a highway right-of-way. Parcels A1 and B1 can be added to Tract C (through a boundary relocation) without DHES approval. Either Parcel A1 or B1 may be sold as an individual parcel if it is large enough to meet sanitation size requirements (minimum of 1 acre if both a well and septic system will be used, or 20,000 square feet if one of the systems will be connected to a public system).

The MSIS provides an exemption from sanitation approval when the following conditions are met (Section 76-4-124):

a. The division is located entirely within a master planned area or within Class 1 or Class 2 municipalities;
b. No extensions of mains are proposed; and
c. The local governing body certifies that municipal water, sewage and solid waste disposal shall be provided within one year.

C. LAND DIVISIONS REQUIRING SANITATION APPROVAL

The land divisions that are subject to sanitation approval under the MSIS include:

1. Subdivisions requiring local approval under MSPA for lots less than 20 acres in size;

2. Those divisions exempted under Section 76-3-207 of the MSPA:
   a. gifts or sales to members of immediate family
   b. relocation of common boundary, unless exempted by one of exemptions explained above;
   c. divisions for agricultural purposes, if structures requiring water or sewer facilities exist or will be erected;
   d. aggregation or redesign of five or fewer lots within a platted subdivision if the lots are not served by public water and sewer systems;

3. Resubdivision of platted subdivisions, mobile home and recreational vehicle parks, subdivisions created by rent or lease, and condominiums.

D. INTERACTION OF THE MSIS WITH THE PUBLIC WATER SUPPLY ACT AND LOCAL SEPTIC TANK REGULATIONS

The MSIS appears to duplicate much of the sanitation regulation under the Public Water Supply Act (PWSA) and local septic tank regulations. A close look at each of those regulatory tools and their history can help answer the concern.

The PWSA dates back to 1907 when state law required the state Board of Health to order every incorporated city in Montana to construct a sewage treatment plant. In 1911 the law was amended because of pressure from local communities. Treatment of sewage was no longer required unless the state Board could prove in district court that a sewage discharge endangered domestic water.

Between 1911 and 1917 a typhoid fever epidemic occurred in Chinook, Harlem, and Laurel. As a result of these outbreaks, particularly the one in Harlem with 106 cases and 5 deaths, the 1917 Legislature changed the 1911 amendment to require local sewage treatment at the discretion of the Board of Health.

In 1945 the law was changed to again require every incorporated city to construct a sewage treatment plant. The 1945 law added a provision that required plans and specifications to be approved by the state Board of Health prior to construction. It also required records be kept on public water supply wells.

A major change occurred in 1977 when wording was added to allow Montana to be granted primacy under the federal Safe Drinking Water Act. The significant changes include: (1) a requirement to establish rules for setting maximum contamination levels, (2) public notice, (3) inventory of public water supplies and (4) contracts with local health departments.

The history of the PWSA indicates that it is intended to regulate only public water and sewer facilities. The MSIS is more encompassing. It regulates the water, sewer and solid waste for subdivisions regardless of the system's size. Public systems are those

that serve 10 or more families or 24 or more people for at least 60 days out of the calendar year.

There are, of course, many rural subdivisions that have sewer and water systems that are smaller than a public system. The review of these small systems fall outside of the authority of the PWSA, but are regulated under MSIS.

The MSIS is written to coordinate with the PWSA. Subdivisions in Class 1 and 2 cities and master planning areas connecting to municipal water and sewer systems are exempt from MSIS and instead are reviewed under the PWSA.

The review requirements have been standardized so that consistency is maintained between the two statutes. Also duplication in regulation is avoided. For example, a sewage treatment system approved for a subdivision under the provisions of the MSIS is automatically approved under the PWSA. All public water systems are reviewed under the PWSA to comply with the federal Safe Drinking Water Act. However, no additional review is needed to comply with the MSIS.

Local Health Review

By the early 1970's all of the more populous counties in the state had adopted local on-site sewage treatment regulations. The regulations required review of the site conditions prior to the issuance of a sewage treatment permit. The sewage treatment permit allowed the installation of a on-site sewage treatment system for a dwelling unit. In those counties that have adopted sewage treatment regulations a sewage treatment permit is required whether or not a subdivision is involved.

Most counties with on-site sewage treatment regulations do not require an additional site investigation if a lot in a subdivision has had the sanitary restrictions lifted, and the septic tank is located at the approved location.

The legislature in 1973 saw the potential problem of a conflict between state and local septic system requirements. They added a provision to the MSIS that the county clerk and recorder could not accept a subdivision plat for filing until the local health officer had issued sanitation approval. The effect of this provision was to force the subdivider into meeting both local and state requirements, and thus saved a lot purchaser from buying a lot in a state approved subdivision only to find that the lot did not meet the local septic system standards.

The 1985 Legislature authorized local health departments that have qualified personnel to accept subdivision review authority for land divisions containing five or fewer parcels with individual water and septic systems. The review must be conducted using DHES review standards.

APPENDIX C

LEGAL INTERPRETATIONS OF THE MONTANA SUBDIVISION AND PLATTING ACT (MONTANA SUBDIVISION LAW DIGEST)

Compiled by: Richard M. Weddle, Staff Attorney, Montana Department of Commerce

February 1994

INTRODUCTION

The following questions explain the implications of the attorney general's opinions and Montana Supreme Court decisions on local government decision making on land use planning issues. These questions and answers may be useful in understanding the legal interpretations of the MSPA. The following information is a general guideline. It may be advisable to do further legal research before making decisions based on this information.

LEGAL EFFECTS OF AN ATTORNEY GENERAL'S OPINION

Question No. 1: What is the effect of an attorney general (A.G.) opinion on a local government? Is it binding?

Answer: If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion shall be controlling unless overruled by a state district court or the Supreme Court. Section 2-15-501(7), MCA.

Question No. 2: What is the effect of an A.G. opinion on a private attorney? Is it binding?

Answer: An A.G. opinion is not binding on a private attorney but the attorney must consider the opinion's controlling influence over governmental agencies and officials in advising his client.

Question No. 3: What is the effect of an A.G. opinion on the Montana Supreme Court, district courts, municipal courts, and justice courts?

Answer: While an attorney general's interpretation of the law is not legally binding on the courts, the Montana Supreme Court has said that an attorney general's opinion, acquiesced in by the legislature, is persuasive and entitled to respectful consideration by the courts and will be upheld if not erroneous. State ex. rel. Ebel v. Schye, 130 Mont. 537, 541, 305 P.2d 350 (1957); State ex. rel. Barr v. District Court, 108 Mont. 433, 436, 91 P.2d 399 (1930).

LEGAL EFFECTS OF A MONTANA SUPREME COURT DECISION

Question: What is the effect of a Montana Supreme Court decision on a local government? Is it binding?

Answer: Although a Supreme Court decision is only binding on the parties involved in the dispute, clear-cut decisions provide operating parameters for local government. Moreover, in resolving disputes which are brought before them, district courts and the Supreme Court generally follow precedents established in earlier Supreme Court decisions involving similar factual situations and legal issues.

MONTANA SUBDIVISION LAW DIGEST

A Summary of Judicial Decisions and Attorneys General Opinions Relating to the Regulation of Land Divisions Under the Montana Subdivision and Platting Act

By Richard M. Weddle, Attorney at Law

February 1994

PREFACE

The *Montana Subdivision Law Digest* is a summary of Montana Supreme Court and district court decisions and attorneys general opinions which have interpreted the provisions of the Montana Subdivision and Platting Act since its enactment in 1973. However, decisions and opinions which have been superseded by subsequent decisions, opinions, or legislative action have been omitted.

Of these determinations the Supreme Court decisions carry the greatest weight because they are generally binding on the attorney general, district courts, and the Supreme Court, itself.

Attorneys general opinions have the next greatest impact because, unless they are judicially overruled, they are controlling over contrary opinions issued by city or county attorneys or attorneys employed by state agencies. [See section 2-15-501(7), MCA.] Furthermore, an attorney general's opinion, acquiesced in by the Legislature, while not binding on the courts, is persuasive and will be upheld if not erroneous. [See *State ex. rel. Ebel v. Schye*, 130 Mont. 537, 541, 305 P.2d 350 (1957) and *State ex rel. Barr v. District Court*, 108 Mont. 433, 436, 91 P.2d 399 (1930).]

Several of the attorneys general opinions included in this *Digest* are informal "letter" opinions. However, the *Digest* does not purport to be exhaustive with respect to these unpublished opinions.

District court decisions, which are also unpublished, have no precedential application in other judicial proceedings. However, they often contain well reasoned expositions of the law that can provide useful guidance to local officials in carrying out their responsibilities under the Act. Because these decisions are unpublished the *Digest* does not purport to be exhaustive with respect to them.

Many of the decisions and opinions summarized herein contain statutory references to the *Revised Codes of Montana, 1947,* which in 1979 were recodified in the *Montana Code Annotated*. For the convenience of the reader the author has converted these references to the corresponding provisions of current statute.

The information contained in the *Digest* should not be regarded as a substitute for obtaining competent legal advice concerning specific land use issues. The author encourages local government officials to consult with their city or county attorney before taking any action with respect to subdivision regulation which may have significant legal implications.

Richard M. Weddle
Helena, Montana
February 1994

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SUBDIVISION AND PLATTING ACT, GENERALLY

I. Validity of Act

By enacting the Montana Subdivision and Platting Act the Legislature did not impermissibly delegate its authority to local governments, and the Act is constitutional under Mont. Const. art. XI, Section 4(1)(b) and (2). *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

II. Relationship of Act to Other Statutes

The provisions of the Montana Environmental Policy Act (sections 75-1-101 *et seq.*, MCA) do not extend the Department of Health and Environmental Sciences' regulatory control over subdivisions under the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA) beyond matters of water supply and sewage and solid waste disposal. The Legislature's intention in enacting the Subdivision and Platting Act (sections 76-3-101 *et seq.*, MCA) was to place control of subdivision development in local governmental units. *Montana Wilderness Association v. Board of Health and Environmental Sciences*, 171 Mont. 477, 559 P.2d 1157 (1976).

III. Effect of Noncompliance with Act -- Curing Defects

Deeds and contracts that convey land in violation of the Act are voidable. 38 Op. Att'y Gen. No. 106 (1980).

Deeds and contracts that convey land in violation of the Act, but with the unauthorized approval of the board of county commissioners are voidable. 38 Op. Att'y Gen. No. 106 (1980).

Violations of the Act may be corrected by the parties to the transaction by voiding the improper conveyance and reconveying the land in accordance with the Act. 38 Op. Att'y Gen. No. 106 (1980).

There is nothing in the Act which prevents an individual who has developed his property contrary to the Act from pursuing a claim for relief against an adjoining subdivision for right-of-access. One who violates state laws or local regulations pertaining to subdivision is guilty of a misdemeanor and, under section 76-3-105, MCA, is subject to fine and imprisonment or both. Furthermore, the county attorney in the county in which the alleged illegal transfers of land have been made is charged with enjoining further sales or transfers [section 76-3-301(3), MCA]. *Smith v. Moran*, 215 Mont. 31, 693 P.2d 1246 (1985).

AUTHORITY OF LOCAL GOVERNING BODY, GENERALLY

I. Adoption and Scope of Local Subdivision Regulations

Under the Act a governing body may adopt and enforce sanitary regulations more stringent than those promulgated by the Montana Department of Health and Environmental Sciences under the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA). 35 Op. Att'y Gen. No. 39 (1973).

Local subdivision regulations may not define the term "subdivision" differently than it is defined by the Act. Letter opinion to Chester L. Jones, Esq., August 19, 1974.

II. Assessment of Review Fees

When a record of survey is properly prepared as a certificate of survey rather than as a subdivision plat, it is not subject to review by the planning board, and no review fee may be charged by the county clerk and recorder. *State ex rel. Swart v. Stucky*, 167 Mont. 164, 536 P.2d 762 (1975).

A local governing body with self-government powers may assess fees for the cost of the examining land surveyor's review of certificates of survey. **[Note: This decision is inapplicable to general-powers local governments.]** *State ex rel. Swart v. Molitor*, 190 Mont. 515, 621 P.2d 1100 (1980).

III. Refusal to Allow Sale of Subdivision Lots

A governing body may not refuse to allow a subdivider to enter into contracts to sell lots in a proposed subdivision prior to the filing of the final plat if he has satisfied the requirements of section 76-3-303, MCA. Letter opinion to Chester L. Jones, Esq., June 15, 1978.

IV. Use of Master Plan to Deny Filing of Certificate of Survey

The existence of an adopted master plan which calls for a minimum lot size of 40 acres does not authorize a governing body to refuse to file a certificate of survey which depicts the creation of parcels containing 20 acres or more. 42 Op. Att'y Gen. No. 16 (1987).

APPLICATION OF ACT TO PARTICULAR SITUATIONS

I. Previous Divisions of Land

The Act does not apply to deeds prepared and executed prior to July 1, 1973, but not presented for recording until after June 30, 1973. 35 Op. Att'y Gen. No. 55 (1973).

Parcels of land for which a certificate of survey has been filed in accordance with the law in force at the time of filing may be conveyed without further compliance with the Act although the requirements of the Act may have changed since the filing. However, the mere surveying of a parcel, without the filing of a certificate of survey (or subdivision plat), creates no rights under the Act. 35 Op. Att'y Gen. No. 96 (1974).

The mere fact that a recorded deed describes the tract conveyed thereby as comprising several small aliquot parts of a section does not segregate these aliquot parts from each other so as to permit their separate conveyance without compliance with the Act. 38 Op. Att'y Gen. No. 66 (1980).

The subsequent sale of an undivided parcel of land that was segregated from another parcel to provide security for a construction lien under section 76-3-201(2), MCA, is not subject to the provisions of the Subdivision and Platting Act or the Sanitation in Subdivisions Act (sections 76-4-101, *et seq.*, MCA). 42 Op. Att'y Gen. No. 101 (1988).

A "deed" in which the grantor and grantee of a portion of a tract of land are one and the same and the interest purportedly conveyed is identical to that held by the grantor is void and, therefore, does not create a "division of land" for purposes of the Act even though it has been accepted for recording by the clerk and recorder. As a result, the property owner's subsequent attempt to convey the parcel identified in the void deed is a new division of land subject to the terms of the Act as they exist at the time of the later conveyance. *Rocky Mountain Timberlands, Inc. v. Lund,* Ravalli Co., No. DV-93-161, 1993.

II. Where No Land Is Being Divided

Transfers of land which do not constitute "divisions of land" or "subdivisions" as those terms are defined in the Act are not subject to the surveying requirements of the Act. 37 Op. Att'y Gen. No. 88 (1977); 42 Op. Att'y Gen. No. 121 (1988).

When the earlier acquisition of right-of-way for a state highway project has severed a "remainder" parcel from the holdings of a land owner, the owner's subsequent conveyance of the "remainder" does not constitute a division of land [section 76-3-103(3), MCA] which must be surveyed under section 76-3-401, MCA. Consequently, a clerk and recorder may not require that the parcel be surveyed and a survey document be filed before the clerk will accept for recording an instrument transferring the parcel. 44 Op. Att'y Gen. No. 25 (1992).

III. Divisions Created by Certificate of Survey

When a record of survey is properly prepared as a certificate of survey rather than as a subdivision plat, it is not subject to review by the planning board, and no review fee may be charged by the county clerk and recorder. *State ex rel. Swart v. Stucky*, 167 Mont. 164, 536 P.2d 762 (1975).

IV. Condominiums

Every condominium development is subject to subdivision review unless it is to be located on a lot specifically approved for condominium development in a subdivision platted since July 1, 1973. [Although this opinion concerns the application of the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA) to condominium development, it appears to apply to the Subdivision and Platting Act as well.] 39 Op. Att'y Gen. No. 28 (1981); Letter opinion to Leo Fisher, Esq., August 2, 1983.

Condominium developments are not exempted from subdivision review by section 76-3-204, MCA, which provides that the sale, rent, lease or other conveyance of one or more parts of a building is not a division of land. 39 Op. Att'y Gen. No. 28 (1981).

To be a "condominium" that is subject to regulation under the Act as a "subdivision" [section 76-3-103(15), MCA] a development must have been submitted to the provisions of the Unit Ownership Act (sections 70-23-101 *et seq.*, MCA). Letter of Advice to William Nels Swandal, Esq., from Assistant Attorney General John Paulson, August 14, 1991.

A multiple-unit bomb shelter the units of which are sold to various persons but which has not been submitted to the provisions of the Unit Ownership Act (sections 70-23-101 *et seq.*, MCA) is not a "condominium" and therefore is not regarded as a "subdivision" under section 76-3-103(15), MCA, of the Act. Letter of Advice to William Nels Swandal, Esq., from Assistant Attorney General John Paulson, August 14, 1991.

Section 76-3-204, MCA, which exempts from subdivision review the sale, rent, or lease of one or more parts of a building does not apply to condominiums. 45 Op. Att'y Gen. No. 12 (1993).

V. Developments Undertaken by State or Federal Agencies

In developing public recreational facilities the Montana Department of Fish, Wildlife and Parks is subject to local subdivision review under the Act to the extent that the agency is creating an area which provides or will provide multiple spaces for recreational camping vehicles. 39 Op. Att'y Gen. No. 14 (1981).

The provisions of the Act are inapplicable to transactions in which the federal government is the subdivider. 42 Op. Att'y Gen. No. 36 (1987).

The Montana Department of State Lands is authorized by sections 77-1-204 and 77-2-301, MCA, to subdivide school trust land; and a governing body is authorized to approve such a subdivision under the Act. *Kimble Properties v. State of Montana*, 231 Mont. 54, 750 P.2d 1095 (1988).

I. Jurisdictional Area of Governing Body

Section 76-3-601(2)(b), MCA, provides that when a proposed subdivision is within one mile of a third-class city the county governing body must submit the preliminary plat to the city or town governing body or its designated agent for review and comment. However, the ultimate decision-making power remains with the county governing board. Letter opinion to Arthur W. Ayers, Jr. Esq., September 28, 1983.

Under section 76-3-601, MCA, the board of county commissioners has exclusive authority to approve or disapprove plats subdividing land located within the three-mile area adjacent to the corporate limits of a city when the city has a commission-manager form of government notwithstanding the provisions of section 7-3-4444, MCA. This latter provision specifies that no subdivision plat of land located within three miles of a commission-manager municipality may be filed unless the director of public service approves the plat. Section 7-3-4444, MCA, grants the city's director of public service only the limited ministerial power to review plats for subdivisions in the three-mile area with respect to their technical adequacy. A city with a commission-manager form of government has two statutorily authorized functions with respect to subdivisions located within the three-mile area (in addition to participating in the master plan process). First, the city's governing body or its designated agent reviews and comments on preliminary plats submitted to it by the county governing body under section 76-3-601(2)(b), MCA. Second, in accordance with section 7-3-4444, MCA, the city's director of public service reviews preliminary plats to ensure their technical adequacy. *City of Bozeman v. Racicot*, 253 Mont. 204, 832 P.2d 767 (1992); sustaining 43 Op. Att'y Gen. No. 26 (1989).

II. Review and Approval Process

A. Criteria for Approving Subdivision

In deciding whether to approve a subdivision the governing body must determine whether the proposed development is in the public interest. Section 76-3-608, MCA. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990). **[Note: The requirement of section 76-3-608, MCA, that a governing body determine that a subdivision will be in "the public interest" before it approved or conditionally approved the subdivision was deleted by the 1993 Legislature (Sec. 5, Ch. 272, L. 1993).]**

B. Written Findings of Fact

The governing body should file the written findings of fact required by section 76-3-608, MCA, immediately following its decision to approve, conditionally approve, or disapprove a subdivision. *Board of Trustees, Huntley Project School District No. 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980).

C. Term and Extension of Preliminary Plat Approval

Under section 76-3-610, MCA, the governing body may extend preliminary plat approval within a reasonable time of the expiration of the original approval period. A gap of a reasonable length between the expiration of the original approval and the granting of an extension does not result in a lapse of the approval. *Oldenburg v. County of Flathead*, 208 Mont. 128, 676 P.2d 778 (1984).

The governing body is authorized by section 76-3-610(1), MCA, to establish the term of a preliminary plat approval within the statutory minimum and maximum of one and three years. Letter opinion to Jim Nugent, Esq., January 12, 1984.

The term of the approval of a preliminary plat is determined by reference to the statutory term limitation which existed at the time the approval was granted. Letter opinion to Jim Nugent, Esq., January 12, 1984.

D. Negligence of Governing Body in Administering Subdivision Regulations

Under section 2-9-111, MCA, a county and board of county commissioners are immune from suit for negligence in the administration of the Act and local subdivision regulations in connection with the approval of a subdivision. *W.D. Construction, Inc. v. Board of County Commissioners of Gallatin County*, 218 Mont. 348, 707 P.2d 1111 (1985). **[Note: This decision has been superseded by 1991 amendments to section 2-9-111, MCA, which now limits local governments' immunity from suit to legislative acts.]**

E. Delegation of Authority to Approve Subdivisions

A governing body may not delegate the approval, conditional approval, or disapproval of subdivision plats to a planning board or a planning board's staff. 41 Op. Att'y Gen. No. 64 (1986).

F. Application of Open Meeting Law to Subdivision Review

A subdivision review and approval carried out in violation of Montana's open meeting law (section 2-3-203, MCA) is invalid. *Board of Trustees, Huntley Project School District No. 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980).

III. Minor Subdivisions

A. Application of Public Interest Criteria to Minor Subdivisions

Subdivisions eligible for review as minor subdivisions must, nonetheless, be found to be in the public interest under section 76-3-608, MCA, before they may be approved by the governing body. *State ex rel. Florence -- Carleton School Dist. v. Board of County Commissioners*, 180 Mont. 285, 590, P.2d 602 (1978). **[Note: The requirement of section 76-3-608, MCA, that a governing body determine that a subdivision will be in "the public interest" before it approved or conditionally approved the subdivision was deleted by the 1993 Legislature (Sec. 5, Ch. 272, L. 1993).]**

B. Procedures for Reviewing Minor Subdivisions

If a subdivision qualifies for summary review under section 76-3-505, MCA, the governing body may not subject it to the environmental assessment or public hearing requirements of the Act unless the local regulations provide for the imposition of these requirements. *Young v. Stillwater County Commissioners*, 177 Mont. 488, 582 P.2d 353 (1978).

C. Eligibility for Minor Subdivision Review

A subdivision plat which creates six lots each of which contains fewer than 20 acres is not entitle to minor subdivision treatment simply because one of the lots is labeled "not part of the subdivision." Letter opinion to Ted O. Lympus, Esq., July 31, 1981. **[Note: The 1993 Legislature amended the definition of "subdivision" contained in section 76-3-103(14), MCA, to include parcels of less than 160 acres. Prior to this amendment the definition encompassed only parcels of less than 20 acres (Sec. 2, Ch. 272, L. 1993).]**

JUDICIAL REVIEW OF DECISION TO APPROVE OR DISAPPROVE SUBDIVISION

I. Decision on Preliminary Plat Non-Appealable

Neither section 76-2-110, MCA, [providing for an appeal to district court of a decision of the board of county commissioners under statutes authorizing county zoning upon a petition of affected property owners (sections 76-2-101 *et seq.*, MCA)] nor section 2-4-702, MCA, [providing for an appeal to district court of a decision of a state agency] provides a legal basis for an appeal from a governing body's decision to approve a preliminary subdivision plat. *Sourdough Protective Assoc., Inc. v. Board of County Commissioners*, 253 Mont. 325, 833 P.2d 207 (1992).

Because the Act does not expressly provide for the judicial appeal of a governing body's decision to approve or disapprove a preliminary subdivision plat, this decision is not ripe for appeal. Only the approval or disapproval of a final plat may be appealed. *City of Kalispell v. Flathead County*, 50 St. Rptr. 1033, 859 P.2d 458 (Mont. 1993).

II. Scope of Review -- Questions of Fact

Prior to approving or disapproving a subdivision the governing body must determine whether the proposed development is in the public interest. In making this decision the governing body, as fact finder, is in the best position to weigh conflicting testimony and determine the credibility of the witnesses. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990). **[Note: The requirement of section 76-3-608, MCA, that a governing body determine that a subdivision will be in "the public interest" before it approved or conditionally approved the subdivision was deleted by the 1993 Legislature (Sec. 5, Ch. 272, L. 1993).]**

III. Law Applicable to Review

In deciding whether a particular development is subject to review as a subdivision the Supreme Court will apply the law in effect at the time it renders its decision. *Lee v. Flathead County*, 217 Mont. 370, 704 P.2d 1060 (1985).

IV. Standing to Challenge Decision of Governing Body

A. Surveyor

An engineering/surveying company hired to plat subdivisions and having no legal or equitable interest in the land involved has no standing to maintain a mandamus action to force the county to act with respect to the proposed subdivision. *State ex rel. Professional Consultants, Inc. v. Board of County Commissioners*, 181 Mont. 177, 592 P.2d 945 (1979).

B. Contingent Purchaser of Property

A person whose obligation to buy property is contingent on his ability to obtain approval of his proposed subdivision of the property has no standing to sue to challenge the validity of a denial of subdivision approval. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990).

V. Validity of Governing Body's Decision

A. Conditional Approval of Subdivisions

As a condition of granting subdivision approval a county may require a subdivider to provide an overall development plan of his property holdings adjacent to the proposed subdivision and may require that the proposed subdivision be developed at a density lower than that originally proposed. *Marbut v. Missoula County*, Missoula Co., No. 9040, 1978.

B. Approval or Disapproval of Subdivision Contrary to Recommendation of Planning Board

It is improper for a governing body to disapprove a subdivision if the planning board has recommended conditional approval if there is nothing in the subdivision review record to support the governing body's findings and if the governing body has failed to comply with the procedural requirements of section 76-3-604, MCA. *Townsend v. Board of County Commissioners*, Gallatin Co., No. DV-83-114, 1983.

C. Denial of Subdivision Approval Based on Consideration of Cumulative Drainage Problems

A governing body did not abuse its discretion by disapproving a proposed subdivision where previous development in the area had created a drainage problem and where the subdivider had failed to establish that his project would not exacerbate the problem. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990).

I. Taxation of Platted Property and Establishment of County Roads

The filing of a subdivision plat does not, by that fact alone, foreclose the possibility that land within that subdivision may qualify as "agricultural" property for purposes of property taxation under section 15-7-202, MCA. 36 Op. Att'y Gen. No. 51 (1976).

A county's approval and the subsequent filing of a subdivision plat bearing a certificate of dedication to public use of the streets shown on the plat does not, by itself, establish the streets as county roads for purposes of sections 7-14-2601 through 7-14-2615, MCA. Consequently, the procedures prescribed in section 7-14-2615, MCA, for the abandonment of county roads do not apply to the abandonment of the streets in the subdivision. *Smith v. Moran*, 215 Mont. 31, 693 P.2d 1246 (1985).

II. Obligation of Subdivider to Construct Roads Shown on Plat

Section 76-3-304, MCA, provides that when land is sold with reference to a properly recorded plat, the plat becomes part of the document conveying the land. The effect of this section is not to create an obligation upon the seller to construct improvements, such as roads, represented on the plat but merely to create an easement for the purchaser's benefit. Whether there is any legally enforceable right to have the developer construct the roads depends not on the designation in the plat but on the use of the plat in inducing purchases. *Majers v. Shining Mountains*, 219 Mont. 366, 711 P.2d 1375 (1986); *Benson v. Pyfer*, 240 Mont. 175, 783 P.2d 923 (1989).

The equitable remedy of specific performance is available to compel a subdivider to construct roads within a subdivision when the subdivider's sales agents used a plat showing a road system in their presentations to prospective purchasers. This is true even though there may not be absolute certainty as to every detail of the obligation of the subdivider. *Majers v. Shining Mountains*, 230 Mont. 373, 750 P.2d 449 (1988).

If a plat designates the route, location, and width of the roadways in question but not the type or nature of the roadways, the obligations generated by sales contracts are sufficiently definite to be enforced through specific performance. *Majers v. Shining Mountains*, 230 Mont. 373, 750 P.2d 449 (1988).

When a court determines that a subdivider should be required to construct roads under the remedy of specific performance but the type or nature of the roadways is nowhere specified, it is reasonable to require that the subdivider construct the roadways to meet standards for county roads. *Majers v. Shining Mountains*, 230 Mont. 373, 750 P.2d 449 (1988).

When, as a condition of receiving county approval of a proposed subdivision, a subdivider has executed a "covenant to dedicate" in which he agrees to donate land within the subdivision to the county for use as a county road and to construct the road to county road standards, the covenant runs with land for the benefit of subsequent lot owners, is binding upon the subdivider,

and is incorporated in the lot owners' deeds by operation of law. *Scherpenseel v. Bitney*, 50 St. Rptr. 1709 (Mont. 1993).

Under section 27-2-202, MCA, (which establishes an eight-year statute of limitations for bringing an action based on a written instrument) an action to enforce a subdivider's covenant to construct roads within a subdivision must be brought within eight years of the date on which lot owners first demanded performance under the covenant -- not the date the covenant was signed by the subdivider. *Scherpenseel v. Bitney*, 50 St. Rptr. 1709 (Mont. 1993).

III. Ownership of Abandoned Roads Adjacent to Platted Subdivisions

When a road that separates two subdivisions is abandoned, title to the center of the road reverts to the owners of abutting property in each subdivision. This conclusion is based on section 76-3-305(1), MCA, that specifies that title to streets and alleys located in vacated portions of a subdivision plat revert to the owners of adjacent property within the plat; section 70-16-202, MCA, that establishes the presumption that an owner of land bounded by a road owns to the center of the road; and section 70-20-307, MCA, that establishes the presumption that a transfer of land bounded by a highway passes the title of the transferor to the center of the highway. *Herreid v. Hauck*, 254 Mont. 496, 839 P.2d 571 (1992).

PARK DEDICATION AND OTHER DEVELOPMENT EXACTIONS

I. Validity of Dedication Requirements, Generally

The park dedication requirement upon which the current requirement (section 76-3-606, MCA) is based is valid and does not constitute an impermissible "taking" of property without compensation under the guise of the police power. *Billings Properties v. Yellowstone County*, 144 Mont. 25, 394 P. 2d 182 (1964).

A governing body may condition approval of a subdivision on the subdivider's dedication of land for a forty-foot frontage road across his property. In insisting on the road dedication in this case the governing body relied on a provision of its subdivision regulations which specifically required that developers provide frontage road approaches to principal or arterial highways. *Vogel v. Board of County Commissioners of Gallatin Co.*, 157 Mont. 70, 483 P.2d 270 (1971).

A governing body may not, as a condition of approving a proposed subdivision, require the subdivider to dedicate a portion of his property to the public for the widening of an adjacent road when the record does not show that the need to widen the road arises "specifically and uniquely" from the proposed subdivision. *Munger v. City of Helena*, Lewis and Clark Co., No. 43004, 1979.

II. Calculating Area of Land to be Dedicated for Parks

The phrase "exclusive of all other dedication" as used in section 76-3-606(1), MCA, includes only dedications for purposes other than public parks and playgrounds. 37 Op. Att'y Gen. No. 38 (1977).

III. Application of Park Dedication Requirement to Minor Subdivisions

"Minor subdivisions" are not exempt from the cash-in-lieu-of-park-land-dedication requirement of section 76-3-606(2), MCA. 37 Op. Att'y Gen. No. 1 (1977).

IV. Decision to Accept Cash in Lieu of Land -- To Whom Payment is Made

The decision to accept cash in lieu of dedication of land for parks in subdivisions must be made on a case-by-case basis. Local governing bodies may not adopt, either formally or informally, a blanket policy waiving the dedication of park land and accepting cash in lieu thereof in all subdivisions containing five or fewer lots. 37 Op. Att'y Gen. No. 169 (1978).

When a proposed subdivision lies within one mile of a third-class city, the county is the "governing body" to which a cash-in-lieu-of-land donation is to be paid under section 76-3-606(2), MCA. Letter opinion to Arthur W. Ayers, Jr. Esq., September 28, 1983.

V. Use of Park Fund

Section 76-3-606(2), MCA, which requires that money paid in lieu of the dedication of land for parks be used for the purchase of park land or for the initial development of parks and playgrounds, precludes the use of the funds to replace a fence, reshingle a roof, or purchase a maintenance tractor, but allows the funds to be used to initially outfit a baseball diamond. Letter opinion to Robert B. Brown, Esq., June 19, 1981.

Section 7-16-2107, MCA, which specifies that there is no restriction on the amount of money a county can spend in acquiring, maintaining, and equipping county parks, does not supersede section 76-3-606(2), MCA, which provides for a cash donation by subdividers in lieu of park land dedications and limits the use of these cash-in-lieu-funds to the "purchase of additional lands or for the initial development of parks and playgrounds." Letter opinion to Robert B. Brown, Esq., June 19, 1981.

Cash donations received by a governing body in lieu of park land dedication under section 76-3-606(2), MCA, may be used to construct capital improvements in parks including restroom facilities. 44 Op. Att'y Gen. No. 13 (1991).

A state-owned recreational facility located within a county may be regarded as a "park" for purposes of expending county park funds under section 76-3-606(2), MCA. 44 Op. Att'y Gen. No. 13 (1991).

I. Limitations on Use of Exemptions -- Authority of Governing Body

A. Generally

If an exemption from subdivision review is employed in an attempt to evade the Act, the division of land in question is to be treated as a subdivision. *State ex rel. Department of Health and Environmental Sciences v. LaSorte*, 182 Mont. 267, 596 P.2d 477 (1979) (dictum).

No division of land is exempted from subdivision review by section 76-3-207, MCA, of the Act if the exemption is claimed for the purpose of evading the Act. Letter opinion to Jim Nugent, Esq., September 21, 1983.

A certificate of survey which depicts a division of land that otherwise would be a subdivision but for which an exemption from subdivision review is claimed is not entitled to filing by the clerk and recorder unless the certificate of survey complies with the Department of Commerce's administrative regulations prescribing the form in which the exemption must be invoked. Letter opinion to Arnie A. Hove, Esq., October 14, 1988.

B. Review of Use of Exemptions

Because local governing bodies have the burden of determining whether an exemption from subdivision review was invoked for the purpose of evading the Act, they may require persons wishing to claim an exemption to provide evidence of their entitlement thereto. 37 Op. Att'y Gen. No. 41 (1977).

Under section 76-3-301(2), MCA, the county clerk and recorder must advise the governing body of a claimed exemption from subdivision review prior to filing a certificate of survey which creates the exempted parcel. The governing body must decide whether the exemption is claimed for the purpose of evading the Act and, if so, deny its use. *Beaverhead County v. Withers*, Beaverhead Co., No. 9212, 1981.

The question of whether an exemption is claimed for the purpose of evading review under the Act is one of fact to be decided by the local governing body in the first instance taking into consideration all of the surrounding circumstances. The local government may require a person claiming exemption from subdivision review to furnish evidence of entitlement to the claimed exemption. 40 Op. Atty Gen. 16 (1983); *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

When a county has adopted criteria and a review procedure for determining whether an exemption from subdivision review is invoked for purposes of evading the Act, the county clerk and recorder and county commission do not act arbitrarily in refusing to allow the exemptions to be used in a manner contrary to the criteria. *Withers v. County of Beaverhead*, 218 Mont. 447, 710 P.2d 1339 (1985).

Governing bodies have the power and duty to evaluate and determine from all the circumstances whether the proposed division of land by exemption is for the purpose of evading

subdivision requirements. Local subdivision regulations may not, however, set out a *per se* or automatic rule to determine when a proposed division of land is an evasion of the act. *State ex rel. Leach v. Visser* (Opinion and Order on Petition for Rehearing) 234 Mont. 438, 767 P.2d 858 (1989); *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

Local governments are authorized to establish procedures to evaluate a proposed conveyance to determine if it is an attempted evasion of the Act. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

Because exemptions of statutes pertaining to health, safety, and welfare of the public should be narrowly construed, a party claiming an exemption from subdivision review has the burden of proving his entitlement to the exemption. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

In determining whether a proposed transfer is a violation of the Act, and therefore, an inappropriate use of an exemption, local government officials need to examine the prior history of developers and the tract in question including the prior use of exemptions from subdivision review. After such an evaluation, an informed decision can be made regarding whether an applicant for an exemption is evading the Act. This retrospective consideration of valid subdivision exemptions to establish an impermissible pattern of land divisions does not constitute a retroactive application of evasion criteria, impair the substantive rights of the property owner, or constitute an impermissible taking of property without just compensation because the previous transactions remain unaffected. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

C. Adoption and Application of Criteria for Determining When an Exemption is Claimed for Purposes of Evading the Act

Local subdivision regulations may not set out a *per se* or automatic rule to determine when a proposed division of land is an evasion of the act. *State ex rel. Leach v. Visser* (Opinion and Order on Petition for Rehearing) 234 Mont. 438, 767 P.2d 858 (1989).

Locally adopted criteria for determining whether an exemption from subdivision review is being invoked for the "purpose of evading" the Act which establish rebuttable presumptions of evasion in certain circumstances do not violate constitutional guarantees of due process. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

D. What Constitutes the Use of Exemptions for the Purpose of Evading the Act

The creation of 13 contiguous one-acre parcels in a single day through the multiple use of the occasional sale exemption is an evasion of the Act. *State ex rel. Department of Health and Environmental Sciences v. LaSorte*, 182 Mont. 267, 596 P.2d 477 (1979) (Dictum). **[Note: The "occasional sale" exemption formerly contained in section 76-3-207(1)(d), MCA, was deleted from the Act by the 1993 Legislature (Sec. 4, Ch. 272, L. 1993).]**

When exemptions from subdivision review have already been used to create several divisions of contiguous tracts under a common scheme, the local governing body is justified in inquiring as to whether the proposed use of the family conveyance exemption [section 76-3-207(1)(b),

MCA] was for purposes of evading the Act and in denying the use of the exemption. *Martinson v. Harding*, Lake Co, No. DV-80-294, 1983.

Where the record shows that property owners have repeatedly, but unsuccessfully, sought to obtain approval of their subdivision plans for the land in question, and where the county has adopted criteria and a review procedure for determining whether exemptions from subdivision review are being used for purposes of evading the Act, the refusal of the county clerk and recorder and county commission to allow the use of the family conveyance exemption [section 76-3-207(1)(b), MCA] to divide the land contrary to the evasion criteria is not arbitrary or capricious. *Withers v. County of Beaverhead*, 218 Mont. 447, 710 P.2d 1339 (1985).

The rearrangement of the common boundary lines between 15 one thirty-second aliquot parts of a section (segregated earlier by deeds) so as to totally obliterate the aliquot parts and replace them with 14 irregularly shaped tracts creates a "subdivision" as a matter of law. The attempted use of the "relocation of common boundary line" exemption [section 76-3-207(1)(a), MCA] to accomplish this rearrangement is for the purpose of evading the Act and, therefore, impermissible. *Meken, Inc. v. Gallatin County Clerk and Recorder*, Gallatin Co., No. DV 93-536, 1993.

II. Specific Exemptions

A. Occasional Sales

[Note: The "occasional sale" exemption formerly contained in section 76-3-207(1)(d), MCA, was deleted from the Act by the 1993 Legislature (Sec. 4, Ch. 272, L. 1993).]

If an occasional sale exemption is employed in an attempt to evade the Act, the division of land in question is to be treated as a subdivision. *State ex rel. Department. of Health and Environmental Sciences v. LaSorte*, 182 Mont. 267, 596 P.2d 477 (1979) (dictum).

The 12-month limitation period on occasional sales of land in sections 76-3-207(1)(d) and 76-3-103(7), MCA, commences with the actual transfer of interest in the parcel of land from the grantor to the grantee. 38 Op. Att'y Gen. No. 117 (1980).

A single certificate of survey may not reflect the creation of more than one lot to be conveyed under the occasional sale exemption provided in section 76-3-207(1)(d), MCA, nor may a certificate of survey qualify for the occasional sale exemption if it divides a parcel of land more than once regardless of the nature of the other parcels created. 40 Op. Att'y Gen. No. No. 16 (1983), as clarified by letter opinion to Jim Nugent, Esq., September 21, 1983.

Land within a parcel created without subdivision review pursuant to the occasional sale exemption may not again benefit from that exemption during the 12-month period following the original transfer. 41 Op. Att'y Gen. No. 21 (1985).

When a parcel of land has been divided into parcels of 20 acres or more, each of the owners of the new parcels is entitled to use the occasional sale exemption once during the 12-month period following the conveyance of the parcels. 41 Op. Att'y Gen. No. 21 (1985). **[Note: The 1993 Legislature redefined the term "subdivision" as it is used in the Subdivision and Platting Act to include divisions of land creating parcels of less than 160 acres (section 76-**

3-103(15), MCA; Sec. 2, Ch. 272, L. 1993). Prior to this change the term included only parcels containing less than 20 acres.]

When a tract of land is divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel may not, in the absence of another legitimately claimed exemption, be sold within 12 months of the sale of the first parcel without subdivision review. 41 Op. Att'y Gen. No. 40 (1986).

Since the legislature has provided that the occasional sale exemption is subject to the condition that it not be used for the purpose of evading subdivision review, the governing body may determine whether this condition has been met. Local subdivision regulations may not, however, set out a per se or automatic rule to determine when a proposed use of the exemption is an evasion of the act. *State ex rel. Leach v. Visser* (Opinion and Order on Petition for Rehearing), 234 Mont. 438, 767 P.2d 858 (1989).

B. Conveyance to Member of Grantor's Immediate Family

"Member of the immediate family" as that term is used in section 76-3-207(1)(b), MCA, means the spouse of the grantor and the children or parents of the grantor by blood or adoption. 35 Op. Att'y Gen. No. 70 (1974) as clarified by letter opinion addressed to Alan L. Joscelyn, Esq., November 8, 1979.

Divisions of land exempted from local subdivision review by section 76-3-207(1)(b), MCA, because they are created for the purpose of a gift or sale to a member of the landowner's immediate family must be surveyed under the terms of section 76-3-401, MCA. In addition these divisions must be approved for sanitary purposes by the Montana Department of Health and Environmental Sciences under section 76-4-122, MCA, before the survey thereof may be filed by the county clerk and recorder. *Huttinga v. Pringle*, 205 Mont. 482, 668 P.2d 1068 (1983).

C. Condominiums Constructed on Land Divided in Compliance with the Act

In order to qualify for the exemption from subdivision review contained in 76-4-111, MCA, a condominium must be located on a lot or on lots specifically approved for condominium development in a subdivision platted since July 1, 1973. 39 Op. Att'y Gen. No. 28 (1981). [Although this opinion concerned the application of section 76-4-111(1), MCA, of the Sanitation in Subdivisions Act, it would also apply to identically worded section 76-3-203, MCA, of the Subdivision and Platting Act.]

D. Sale, Rent, or Lease of One or More parts of a Building

Section 76-3-204, MCA, which provides that the sale, rent, lease or other conveyance of one or more parts of a building is not a division of land does not exempt condominium developments from subdivision review. 39 Op. Att'y Gen. No. 28 (1981).

Because section 76-3-204, MCA, exempts the rental of both existing and new buildings from subdivision review, the construction of a building for apartment use is not subject to regulation under the Act. *Lee v. Flathead County*, 217 Mont. 370, 704 P.2d 1060 (1985).

Section 76-3-204, MCA, which exempts from subdivision review the sale, rent, or lease of one or mare parts of a building does not apply to condominiums. 45 Op. Att'y Gen. No. 12 (1993).

E. Divisions Created by Court Order or Operation of Law

The sale by a county of that portion of a subdivision lot which lies within a rural special improvement district to satisfy a lien against the property for unpaid R.S.I.D. assessments is a division of property "by operation of law" which is exempt from the provisions of the Act under section 76-3-201(1), MCA. 39 Op. Att'y Gen. No. 48 (1982).

In a probate proceeding an agreement between coinheritors of a tract of land to divide the tract among themselves under section 72-3-915, MCA, is not exempt from the Act under section 76-3-201(1), MCA, as a division of land by operation of law. However, when the agreement is incorporated into the court's decree of distribution or other order, the division is exempt under that section as a division by court order. Letter opinion to Robert Zeigler, October 3, 1985.

F. Divisions Which Could Have Been Created Pursuant to the Law of Eminent Domain

The term "the law of eminent domain" as used in section 76-3-201(1), MCA, includes federal condemnation proceedings, and the Act's eminent domain exemption applies to conveyances of privately owned land to the United States Department of Agriculture pursuant to 16 U.S.C. Section 485. 42 Op. Att'y Gen. No. 36 (1987).

When a division of land is exempt from the Act's surveying and subdivision review requirements because it could have been created by order of a court pursuant to the law of eminent domain [section 76-3-201(1), MCA], a "remainder" parcel created by the division is also exempt from the requirements of the Act. 44 Op. Att'y Gen. No. 25 (1992).

G. Land Acquired for State Highways

Where a division of land is exempt from the Act's surveying and subdivision review requirements because it involved the acquisition of land for state highways (section 76-3-209, MCA), a "remainder" parcel created by the division is also exempt from the requirements of the Act. 44 Op. Att'y Gen. No. 25 (1992).

H. Relocation of Common Boundary Lines

The rearrangement of the common boundary lines between 15 one thirty-second aliquot parts of a section (segregated earlier by deeds) so as to totally obliterate the aliquot parts and replace them with 14 irregularly shaped tracts creates a "subdivision" as a matter of law. The attempted use of the "relocation of common boundary line" exemption [section 76-3-207(1)(a), MCA] to accomplish this rearrangement is for the purpose of evading the Act and, therefore, impermissible. *Meken, Inc. v. Gallatin County Clerk and Recorder*, Gallatin Co., No. DV 93-536, 1993.

III. "Remainder" Doctrine

The Department of Health and Environmental Sciences has the authority under the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA) to review "remainders" of less than 20 acres and may require that these remainders be shown on plats submitted for the Department's review. 37 Op. Att'y Gen. No. 74 (1977).

A "remainder" which is created by the segregation of a subdivision from a larger original tract is not part of the subdivision nor is it subject to the Subdivision and Platting Act's surveying requirements regardless of its size. As used in this context a "remainder" is that part of an original tract which is left following the segregation of other parcels from the tract for the purpose of transferring these other parcels. To qualify as a "remainder" a parcel must not have been created for the purpose of transfer and must be retained by the owner. [Although the term "remainder" does not appear in the Act, the possibility that remainder parcels may exist is implicit in the express provisions of the Act.] Letter opinion to Robert M. McCarthy, Esq., April 22, 1987.

Where the earlier acquisition of right-of-way for a State highway project has severed a "remainder" parcel from the holdings of a land owner, the owner's subsequent conveyance of the "remainder" does not constitute a division of land [section 76-3-103(3), MCA] which must be surveyed under section 76-3-401, MCA. Consequently, a clerk and recorder may not require that the parcel be surveyed and a survey document be filed before the clerk will accept for recording an instrument transferring the parcel. 44 Op. Att'y Gen. No. 25 (1992).

Where a division of land is exempt from the Act's surveying and subdivision review requirements because it could have been created by order of a court pursuant to the law of eminent domain [section 76-3-201(1), MCA], a "remainder" parcel created by the division is also exempt from the requirements of the Act. 44 Op. Att'y Gen. No. 25 (1992).

IV. Use of Exemptions Within Platted Subdivisions

A survey which will increase the number of parcels in a platted subdivision must be filed in the form of a plat amendment under section 76-3-207(2)(a), MCA. *State ex rel. Swart v. Best*, Gallatin Co., No. 23929, 1977.

Section 76-3-201(2), MCA, which exempts from the requirements of the Act divisions of land created to provide security for construction mortgages, liens, or trust indentures, applies both within and outside of platted subdivisions. *West v. Klundt*, Yellowstone Co., No. DV-79-1221, 1979).

A city does not constitute a "platted subdivision" for purposes of section 76-3-207(2), MCA. Consequently, the requirement of that section that any division of land within a platted subdivision which increases the number of lots or rearranges six or more lots be reviewed as a subdivision does not apply to divisions of land within the corporate boundaries of a city but outside any platted subdivision. 38 Op. Att'y Gen. No. 108 (1980).

I. Satisfying 180-Day Filing Requirement

Section 76-3-404, MCA, requiring surveyors to file a certificate of survey within 180 days of the completion of a survey is satisfied when the surveyor presents the certificate for filing. The refusal of the clerk and recorder to file a certificate of survey presented within the time limit does not place the surveyor in noncompliance with the statutory requirement. *State ex rel. Swart v. Molitor*, 190 Mont. 515, 621 P.2d 1100 (1980).

II. What Constitutes a One Thirty-Second Aliquot Part of a Section

For purposes of section 76-3-401, MCA, which requires that divisions of land, other than subdivisions, which cannot be described as 1/32 or larger aliquot parts of a section be surveyed, a 1/32 aliquot part need not be contained entirely within the same section. *Timberland Resources, Inc. v. Vaught*, 227 Mont. 247, 738 P.2d 1277 (1987).

III. What Parcels Must Be Surveyed -- "Remainders"

Only those parcels that are segregated from an original tract for purposes of transfer are subject to the Act's surveying requirements. A "remainder," i.e. that portion of an original tract which is not itself created for transfer but which is left after other parcels are segregated for transfer, is not subject to the Act's surveying requirements regardless of its size. Letter opinion to Robert M. McCarthy, Esq., April 22, 1987.

Where the earlier acquisition of right-of-way for a State highway project has severed a "remainder" parcel from the holdings of a land owner, the owner's subsequent conveyance of the "remainder" does not constitute a division of land [section 76-3-103(3), MCA] which must be surveyed under section 76-3-401, MCA. Consequently, a clerk and recorder may not require that the parcel be surveyed and a survey document be filed before the clerk will accept for recording an instrument transferring the parcel. 44 Op. Att'y Gen. No. 25 (1992).

IV. Scope of Examining Land Surveyor's Review

Under section 76-3-611(2), MCA, an examining land surveyor may refuse to approve a certificate of survey only because of errors in calculations or drafting and may not refuse to approve it on the grounds that the underlying survey does not comply with state monumentation requirements. *State ex rel. Swart v. Stucky*, Gallatin Co., No. 22597, 1976.

V. Failure to Satisfy Surveying and Filing Requirements

In the absence of the necessary approvals from the Department of Health and Environmental Sciences under the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA) the county

clerk and recorder is statutorily required to refuse to file a certificate of survey creating a division of land under the "family conveyance" exemption of section 76-3-207(1)(b), MCA. Consequently, a writ of mandamus (which may be issued by a court to compel a public official to perform a clear legal duty) is not available to force the clerk and recorder to accept the certificate. *Huttinga v. Pringle*, 205 Mont. 482, 668 P.2d 1068 (1983). **[Note: The Sanitation in Subdivisions Act applies only to divisions of land containing less than 20 acres. Section 76-4-102(13), MCA.]**

The clerk and recorder has a mandatory statutory duty not to record otherwise proper deeds which fail to comply with the surveying requirements of the Act. *Rocky Mountain Timberlands, Inc. v. Lund*, Ravalli Co., No. DV-93-161, 1993.

VI. Qualifications of Professional Land Surveyor

A professional land surveyor registered in the state of Montana need not be a resident of Montana when signing off on certificates of survey. 43 Op. Att'y Gen. No. 9 (1989).

SUBDIVISION IMPROVEMENTS AGREEMENTS

I. Interpreting Ambiguous Terms

A subdivision improvements agreement will be interpreted by the courts according to the rules of construction which apply to any contract. If an essential term of an agreement is ambiguous, the meaning of the term is a question of fact for the jury. *Gray v. City of Billings*, 213 Mont. 6, 689 P.2d 268 (1984).

WORDS AND PHRASES DEFINED

I. Condominium

The conversion of existing rental-occupancy apartment houses or office buildings to an individual condominium form of ownership does not constitute a "condominium" which is subject to the requirements of the Act. 39 Op. Att'y Gen. No. 74 (1982).

To be a "condominium" that is subject to regulation as a "subdivision" under the Subdivision and Platting Act [section 76-3-103(15), MCA] a development must have been submitted to the provisions of the Unit Ownership Act (sections 70-23-101 *et seq.*, MCA). Letter of Advice to William Nels Swandal, Esq., from Assistant Attorney General John Paulson, August 14, 1991.

II. County Road

A county's approval and the subsequent filing of a subdivision plat bearing a certificate of dedication to public use of the streets shown on the plat does not, by itself, establish the streets as "county roads" for purposes of sections 7-14-2601 through 7-14-2615, MCA, which govern the establishment, alteration, and abandonment of county roads. *Smith v. Moran*, 215 Mont. 31, 693 P.2d 1246 (1985).

III. Division of Land

The mere surveying of a parcel, without the filing of a certificate of survey [or subdivision plat], creates no rights under the Act. 35 Op. Att'y Gen. No. 96 (1974).

The mere fact that a recorded deed describes the tract conveyed thereby as comprising several small aliquot parts of a section does not segregate these aliquot parts from each other so as to permit their separate conveyance without compliance with the Act. 38 Op. Att'y Gen. No. 66 (1980).

A "deed" in which the grantor and grantee of a portion of a tract of land are one and the same and the interest conveyed is identical to that held by the grantor is void and, therefore, does not create a "division of land" for purposes of the Act even though it has been accepted for recording by the clerk and recorder. As a result, the property owner's subsequent attempt to convey to the parcel identified in the void deed is a new division of land subject to the terms of the Act as they exist at the time of the later conveyance. *Rocky Mountain Timberlands, Inc. v. Lund*, Ravalli Co., No. DV-93-161, 1993.

IV. Exclusive of All Other Dedications

The phrase "exclusive of all other dedications" as used in the park-land dedication requirement of section 76-3-606(1), MCA, includes only dedications for purposes other than public parks and playgrounds. 37 Op. Att'y Gen. No. 38 (1977).

V. Governing body

When a proposed subdivision lies within one mile of a third-class city, the county is the "governing body" to which a cash-in-lieu-of-land donation is to be paid under section 76-3-606(2), MCA. Letter opinion to Arthur W. Ayers, Jr. Esq., September 28, 1983.

VI. Law of Eminent Domain

The term "law of eminent domain" as it is used in section 76-3-201(1), MCA, includes federal condemnation proceedings. 42 Op. Att'y Gen. No. 36 (1987).

VII. Member of the Immediate Family

"Member of the immediate family" as that term is used in the Act [section 76-3-207(1)(b), MCA] means the spouse of the grantor and the children or parents of the grantor by blood or adoption. 35 Op. Att'y Gen. No. 70 (1974) as clarified by letter opinion addressed to Alan L. Joscelyn, Esq., November 8, 1979.

VIII. Minor Subdivision

A subdivision plat which creates six lots each of which contains fewer than 20 acres is not entitle to minor subdivision treatment simply because one of the lots is labeled "not part of the subdivision." Letter opinion to Ted O. Lympus, Esq., July 31, 1981. **[Note: The 1993 Legislature amended the definition of "subdivision" contained in section 76-3-103(14), MCA, to include parcels of less than 160 acres. Prior to this amendment the definition encompassed only parcels of less than 20 acres (Sec. 2, Ch. 272, L. 1993).]**

IX. One Thirty-Second or Larger Aliquot Part of a United States Government Section

A "1/32 or larger aliquot part of a United States Government section," as that phrase is used in section 76-3-401, MCA, need not be contained entirely within the same section. *Timberland Resources, Inc. v. Vaught*, 227 Mont. 247, 738 P.2d 1277 (1987).

X. Park

A state-owned recreational facility located within a county may be regarded as a "park" for purposes of expending county park funds under section 76-3-606(2), MCA. 44 Op. Att'y Gen. No. 13 (1991).

XI. Platted Subdivision

A city is not a "platted subdivision" for purposes of section 76-3-207(2), MCA, which provides that within a platted subdivision any division of land which results in an increase in the number of lots or which redesigns or rearranges six or more lots must be reviewed and approved as a subdivision. 38 Op. Att'y Gen. No. 108 (1980).

XII. Remainder

A "remainder," [a concept arising from the Act by implication] is that portion of an original tract which is not itself created for transfer but which is left after other parcels are segregated for transfer. Letter opinion to Robert M. McCarthy, Esq., April 22, 1987.

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APPENDIX D

AN OVERVIEW OF LAND RECORDS AND THE BASICS OF FILING AND RECORDING PROCEDURES

A. SURVEY DOCUMENTS

1. Certificates of Survey

A certificate of survey is a scaled drawing of a field survey. It's purpose is to provide information relating to the survey – location of survey monuments, bearings of survey lines, basis for determining the bearings, size of parcels created, boundary lines established as a result of the survey, purpose of the survey, and the landowner. The certificate of survey is the document on which the survey is graphically shown (the "Uniform Standards for Certificates of Survey require that the document be 18 by 24 inches) and is submitted to the county clerk and recorder for filing.

The purpose in performing a land survey can include: dividing a tract into smaller parcels, relocating or moving boundary lines, retracing or remeasuring existing survey lines, or replacing missing monuments.

In most offices of the county clerk and recorder, certificates of survey are received by the clerk, checked for compliance with state laws, local regulations and compliance with the "Uniform Standards for Certificates of Survey." When the clerk determines that the certificate of survey is proper for filing, it is entered in the Reception Book, given a Reception Number, which is assigned chronologically to all documents submitted to the clerk and recorder office for filing or recording.

The certificate of survey is given a certificate of survey number (called a "plat number" in many clerk and recorder offices). Two copies of the certificate of survey must be submitted –– a cloth–backed or opaque mylar copy, and a reproducible copy on translucent mylar. Often a number of accompanying documents must be submitted with the certificate of survey –– a Certificate of Subdivision Plat Approval by the Department of Health and Environmental Sciences, a certificate from the county treasurer that the property taxes are not delinquent, and certain covenants.

In many clerk and recorder offices both the cloth–backed copy and the reproducible are filed together in a hanging file, which consists of a large plastic envelope large enough to hold the certificate of survey without folding, and designed to be hung in a specially constructed cabinet.

In other offices the two copies are filed separately. The opaque copy is filed in a book or in hanging files, and the reproducible is available to make copies. In some courthouses the reproducible copy is sent to the county appraiser for filing.

Many county clerk and recorder offices make microfilm copies of certificate of survey for easy storage and availability.

2. Subdivision Plats

A subdivision plat differs from a certificate of survey in that it is a drawing not only of the field survey creating subdivision lots, but also of the subdivision, lots, blocks, streets and roads, dedications, and improvements. Subdivision plats are the documents used to file records of land developments that must be approved by the governing body.

As with a certificate of survey, a final subdivision plat is the document filed with the clerk and recorder to create approved subdivision lots.

County clerk and recorders use the same procedures for filing subdivision plats as they do for certificates of survey. Plats are given a number in the Reception Book, and are recorded in the "tract book," an index of parcels organized by section, township and range. Many clerk and recorders also index plats in a separate index by plat number, or in an alphabetical index by the name of the subdivision.

Usually the clerk files plats separately from certificates of survey, in recognition of the difference between plats and certificates of survey. In some offices, however, the two types of documents are filed together under one filing system.

Again, as with certificate of survey, many clerk and recorder offices microfilm subdivision plats to facilitate retrieval and use of the documents.

Amendments to subdivision plats are filed with the original plat in many courthouses. Where a plat amendment is given a separate plat number and filed separately in the filing system, a cross reference often is indicated in the index to alert an interested party that the original plat has been changed.

B. INSTRUMENTS OF CONVEYANCE

Deeds, contracts for deed and other instruments conveying title or interest in property are recorded in the clerk and recorder's office. Unlike plats and certificates of survey that are kept on file in the office, a record is made of each conveyance and the document is returned to the owner.

Conveyances are not required to be recorded, but by having the clerk and recorder record an instrument of conveyance, the grantee is making public notice that he has an interest in the property. Where title is conveyed to the grantee, the public recording of that conveyance prevents other persons from claiming title to the same property. Also, where

interest in property is conveyed for security, such as a mortgage, the earliest recording of the conveyance will be a senior interest in the property.

The clerk and recorder makes a record of deeds, and contracts for deeds (usually represented by a Notice of Purchaser's Interest) in two books or indexes, the Grantor Book and the Grantee Book. The clerk records the transaction in each Book in chronological order as each is submitted for recording. The description of the property, grantor, grantee, type of instrument, date of recording are entered into both the Grantor Book and the Grantee Book.

The important factor that the clerk must consider is whether the instrument of conveyance is required to refer to a filed certificate of survey or subdivision plat. If the conveyance is for a portion of an existing tract, the instrument must refer to a filed certificate of survey or subdivision plat unless the property can be described by reference to an aliquot part of a section, or is exempt from surveying requirements under Section 76-3-201, MCA of the MSPA.

The instrument conveying a parcel that requires a survey must describe the parcel or lot by reference to the parcel number on a filed certificate of survey, or to lot and block of a subdivision plat. Certificates of survey are given a number when filed; plats are filed by the name of the subdivision. For example, a deed would describe a conveyed property as Parcel A of Certificate of Survey #2406; or in the case of a subdivision lot, as Lot 3, Block 2, of the John Doe Subdivision.

The clerk and recorder may not record a deed or other document conveying title to property unless the proper filing requirements are met.

Conveyances of entire tracts, or tracts that can be described by reference to aliquot parts of a section may be recorded without reference to a filed survey document.

1. Warranty Deeds

A warranty deed is a document in which the grantor guarantees, or "warrants," that he has legal title or the legal interest in the property that he is conveying to the grantee. Usually a title abstract or title insurance is purchased to show that the grantor does in fact have the interest in the property that he is conveying. The title insurance is issued after a search of the history of the property to determine that the grantor legally owns the interest in the property, and whether certain encumbrances affect clear title.

2. Quit Claim Deeds

A quit claim deed conveys all the interest a grantor has to the grantee. It does not, however, make any claims that the grantor holds any legal interest in the property.

Quit claim deeds are used, for example, where one party to a joint ownership conveys his interest in the property to the other owner(s). They are also used to convey the portion of one parcel to the adjacent owner under a relocation of a common boundary.

3. Contracts For Deeds

A common means of buying real property is for the purchaser to enter into a contract with the owner to make payments for the property over an specified period of time and under specified conditions, such as the interest rate. That contract – a contract for deed – conveys to the purchaser possessory interest that carries certain rights of ownership.

Until the terms of the contract have been met, the grantee does not have a deed to record, but because he has a contract for deed, he is able to record his possessory interest. Rather than record the contract for deed, the purchaser often has a Notice of Purchaser's Interest prepared, and that document is submitted to the clerk and recorder for recording.

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APPENDIX E

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A KEY TO THE FILING REQUIREMENTS

OF THE

MONTANA SUBDIVISION AND PLATTING ACT

AND

MONTANA SANITATION IN SUBDIVISIONS ACT

FIFTH EDITION

Prepared By:

Montana Department of Commerce
Local Government Assistance Division
Community Technical Assistance Program

August 1994

PREFACE

Abstract

The Key is designed to be used by county clerk and recorders, local government planners, surveyors, subdividers, and developers. The Key explains the legal and technical requirements for preparing and filing certificates of survey and subdivision plats in Montana. A companion booklet, A Guide To The Exemptions, is also useful to local government officials who must check the propriety of land division proposals which claim exemptions from subdivision review. These booklets are services to Montana local governments and the private sector from the Montana Department of Commerce Community Technical Assistance Program.

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INTRODUCTION

The Montana Subdivision and Platting Act (MSPA) was enacted on July 1, 1973. Since that time subsequent legislatures have amended the Act, state departments have adopted and amended administrative rules, and the attorney general has issued numerous legal opinions in regard to specific language in the Act. The law was significantly amended by the 1993 Montana Legislature. Consequently, a good deal of confusion may exist at the time of filing as to what constitutes a valid certification, what documents must accompany the filed document, and what information must be on the face of the survey document to be in compliance with the law. The Key is designed to outline all pertinent requirements of law in order for the clerk and recorder to legally file a survey document. Private surveyors, engineers, developers, and subdividers will also find the key useful in determining how to prepare documents for filing purposes.

In order to use the key, one must first study the face of the document in order to determine:

1. **Is the document a subdivision plat, an amended plat, a corrected plat, or a certificate of survey?**

2. **Are any exemptions from subdivision review claimed?**

3. **Are any exemptions from sanitary review claimed?**

These three questions should direct you to the proper key reference.

For example, a document is presented for filing. The document is a certificate of survey; it claims an exemption from subdivision review as a boundary relocation; it claims an exemption from sanitary review as acquiring additional property. In the preceding Table of Contents under EXEMPTIONS FROM THE SUBDIVISION AND PLATTING ACT, you will see an exemption entitled "Relocation of Common Boundary . . . ." Turn to the page noted, and you will find all the filing requirements for the document plus model language for the certification. Next, under "EXEMPTIONS FROM THE SANITATION IN SUBDIVISIONS ACT," you will find an exemption entitled "Acquire Additional Lands . . . ." Turn to the page noted, and you will find, under the appropriate heading, model language for the certification which meets the department's legal requirements.

Before filing any subdivision plat, amended plat, certificate of survey, or other instrument of conveyance which may divide land, county officials and staff must determine whether or not the landowner/developer is legally entitled to use the type of document presented to the county for filing. This Key and another booklet, A guide to The Exemptions, are useful references for county officials.

PART 1: SUBDIVISION PLATS

SUBDIVISION PLATS
FINAL SUBDIVISION PLAT
[SECTION 76-3-402, MCA]

Under Montana's subdivision laws and administrative rules there are two types of subdivisions: minor subdivisions consisting of five or fewer lots in which no land is to be dedicated for park or playground use and major subdivisions consisting of more than five lots. However, from a filing standpoint both types are handled in the same way -- both must be filed as final subdivision plats subject to the following requirements (ARM 8.94.3003).

1. They must be legibly drawn with permanent ink or printed or reproduced by a process guaranteeing a permanent record and must be 24 inches by 36 inches overall including a 1 1/2 inch margin on the binding side.

2. One signed cloth-backed or opaque mylar copy and one signed, reproducible copy on a stable based polyester film or equivalent must be submitted.

3. When more than one sheet is used to portray the land subdivided, each sheet must show the number of that sheet and the total number of sheets included. All certifications shall be shown or referred to on one sheet.

4. A final plat must show or contain, on its face or on separate sheets referred to on its face.

a. A title block indicating the quarter-section, section, township, range, principal meridian, and county of the subdivision. The title of the plat must contain the words "plat" and "subdivision," and space should be provided on the plat for the clerk and recorder's filing information in the following suggested form:

Filed on the ____ day of _____ A.D.
at _____ o'clock __.M.

_____
County Clerk and Recorder
By_____
Deputy

b. The name(s) of the owner(s) of the land surveyed and the names of any adjoining platted subdivisions and the numbers of any previously recorded adjoining certificates of survey and ties thereto.

c. A north point.

d. A scale bar. (The scale must be large enough to legibly represent the information shown on the plat.)

e. All monuments found, set, reset, replaced or removed; a description of their kind, size, location; and other data relating thereto.

f. Witness monuments, basis of bearing, bearings, and lengths of lines.

g. The bearings and lengths of and land curve data for all perimeter boundary lines. When the subdivision is bounded by an irregular shoreline or body of water, the bearings and distances of a meander traverse must be given.

h. Data for all curves, including arc radii and lengths and notations of nontangent curves, sufficient to enable the reestablishment of the curves on the ground.

i. The lengths of all lines shown to at least tenths of a foot, and all angles and bearings shown to at least the nearest minute.

j. The location of all section corners or legal subdivision corners of sections pertinent to the subdivision boundary.

k. All lots and blocks in the subdivision, designated by number, the dimensions of each lot and block, the area of each lot, and the total acreage of all lots. (Excepted parcels must be marked "Not included in this subdivision" or "Not included in this plat"; as appropriate, and their boundaries must be completely delineated by bearings and distances.)

l. All streets, alleys, avenues, roads and highways; their widths and bearings; the width and purpose of all rights-of-way; and the names of all streets, roads, and highways.

m. The location, dimensions, and areas of all parks, common area, and other grounds dedicated to public use.

n. The gross and net acreage of the subdivision.

o. A legal description of the perimeter boundary of the tract surveyed.

p. All monuments to be of record adequately described and clearly Where additional monuments are to be set subsequent to the filing of the plat, the location of such additional monuments must be shown by a distinct symbol noted on the plat. All monuments or other evidence found

during retracements that would influence the positions of any corner or boundary indicated on the plat must also be clearly shown.

q. The signature and seal of the registered land surveyor responsible for the survey.

r. A memorandum of oaths administered, if any.

s. Certification by the governing body that the final subdivision plat is approved, except where the plat shows changes to a filed subdivision plat which are exempt from local government review under section 76-3-207(1)(e), MCA. Where an amended plat qualifies for such a waiver, the plat must contain a statement that pursuant to section 76-3-207(1)(e), MCA, approval by the local governing body is not required when relocation of common boundary lines rearranges or redesigns five or fewer lots or where five or fewer lots are aggregated. The survey document must show any relocation of boundary lines or aggregation of lots.

5. The following documents must accompany the approved final plat:

a. A certification of dedication of streets, parks or playgrounds, and other public improvements, or when applicable, cash donation in lieu of dedication.

b. A certification by a title abstractor showing the names of the owners of record of the land to be subdivided and the names of any lien holders or claimants of record against the land and the written consent to the subdivision by the owners of the land, if other than the subdivider, and any lien holders or claimants of record against the land.

c. Copies of any covenants or deed restrictions relating to public improvements.

d. A certification by the State Department of Health and Environmental Sciences that it has approved the plans and specifications for sanitary facilities.

e. Copies of articles of incorporation and bylaws for any property owners' association.

f. A certification by the subdivider indicating which required public improvements have been installed and a copy of any subdivision improvements agreement securing the future construction of any additional public improvements to be installed.

g. Copies of final plans, profiles, grades, and specifications for improvements, including a complete grading and drainage plan, with the certification of a registered professional engineer that all required improvements which have

been installed are in conformance with the attached plans.

h. A certification by the governing body expressly accepting and dedicated land and improvements.

i. The certification of the examining land surveyor where applicable.

j. A copy of the Montana Department of Highways permit when a new street will intersect with a state highway.

k. The certification of the county, city, or town attorney where required by the governing body pursuant to 76-3-612(2), MCA.

l. A certification by the county treasurer, pursuant to 76-3-3-611(1)(b), MCA, that no real property taxes assessed and levied on the land to be subdivided are delinquent.

AMENDED SUBDIVISION PLAT -- CREATION OF ADDITIONAL LOTS OR REDESIGN OF SIX OR MORE LOTS WITHIN A PLATTED SUBDIVISION [SECTION 76-3-207(2)(a), MCA].

When lands within a platted and filed subdivision are further divided to create additional lots, or when six or more lots in a subdivision are aggregated or redesigned, or boundaries between six or more lots are relocated, an amended plat must be filed. This amended plat is subject to review by the governing body and by the Department of Health and Environmental Sciences. The title of the plat submitted for filing must clearly state that it is the "Amended plat of _____ Subdivision."

The filing requirements for these amended plats are the same as those for final subdivision plats.

AMENDED PLAT -- FIVE OR FEWER LOTS WITHIN A PLATTED SUBDIVISION -- RELOCATION OF COMMON BOUNDARIES OR AGGREGATION, REARRANGEMENT OR REDESIGN OF LOTS [SECTION 76-3-207(1)(e), MCA].

When five or fewer lots within a platted subdivision are to be aggregated or redesigned or when their common boundary lines are to be relocated, and no additional lots are created, the division of land is exempt from review under the Subdivision and Platting Act, and it may be exempt from review under the Sanitation in Subdivisions Act if it is currently served by public water and sewer. If an approval statement from DHES is not included with the submittal, the face of the plat must bear an appropriate certification which cites the applicable exemption; the exemption certification must conform substantially to the appropriate model language shown on page 21, "Boundary Changes/Aggregation of Lots."

The filing requirements for these amended subdivision plats are the same as those for final

subdivision plats except that instead of a certification by the governing body that it has approved the plat, the plat will bear a certification in substantially the following form:

> I (we) hereby certify that the purpose of this survey is to (aggregate) (redesign) (relocate common boundaries between) existing lots within a platted subdivision, that fewer than six lots are affected, and that no additional lots are hereby created. Therefore, this survey is exempt from review as a subdivision pursuant to section 76-3-207(1)(e), MCA.

The signatures of all the landowners whose parcels have been affected by the relocations must accompany this certification.

CORRECTION SUBDIVISION PLAT

Corrections of drafting or surveying errors which do not materially alter the plat may be made by the submission of a corrected final plat for the governing body's approval. The plat submitted for filing must be entitled "Corrected Plat of the _____ Subdivision," and the reason for the correction must be stated on the face of the plat.

The filing requirements for corrected plats are the same as those for final subdivision plats.

PART 2: EXEMPTIONS FROM THE SUBDIVISION AND PLATTING ACT (INCLUDING CERTIFICATE OF SURVEYS)

CERTIFICATE OF SURVEY GENERAL REQUIREMENTS [SECTION 76-3-404, MCA]

A certificate of survey must meet the following requirements of ARM 8.94.3002 before it can be filed by the County Clerk and Recorder.

1. Certificates of survey must be legibly drawn with permanent ink or printed or reproduced by a process guaranteeing a permanent record and must be 18 inches by 24 inches in overall size including a 1 1/2 inch margin on the binding side.

2. One signed cloth-backed or opaque mylar copy of the certificate and one signed reproducible copy on a stable base polyester film or equivalent must be submitted.

3. When more than one sheet is used to portray the surveyed land, each sheet must show the number of that sheet and the total number of sheets included. All certifications must be shown or referred to on one sheet.

4. A certificate of survey must show or contain on its face or on separate sheets referred to on its face the following information only:

a. A title block including the quarter-section, section, township, range, principal meridian and county of the surveyed land. Space must be provided on the certificate of survey for the clerk and recorder's filing information in the following suggested form:

Filed on the ____ day of _____ A.D.
at _____ o'clock __.M.

_____
County Clerk and Recorder
By_____
Deputy

A certificate of survey may not bear the title "plat", subdivision, "or any title other than "Certificate of Survey."

b. The name(s) of the owner(s) of the land surveyed and the names of any adjoining platted subdivisions and the numbers of any previously recorded adjoining certificates of survey and ties thereto.

c. The date the survey was completed and a brief description of why the the certificate of survey was prepared, such as creation of a new parcel, retracement of section line, retracement of existing tract of land.

d. A north point.

e. A scale bar. (The scale must be large enough to legibly represent the information shown on the certificate of survey.)

f. A description of all monuments found, set, reset, replaced or removed; including kind, size, location, and other information related thereto.

g. The location of any corners of sections or divisions of section pertinent to the survey.

h. Witness monuments, basis of bearing, bearings, and lengths of lines.

i. The bearings and lengths of and curve data for all perimeter boundary lines. When the parcel surveyed is bounded by an irregular shoreline or body of water, the bearings and distances of a meander traverse must be given.

j. Data, including arc radii and lengths and notations of nontangent curves, for all curves sufficient to enable the reestablishment of the curves on the ground.

k. The lengths of all lines shown to at least tenths of a foot, and all angles and bearings, shown to at least the nearest minute.

l. A legal description of the perimeter boundary of the tract surveyed.

m. All parcels created by the survey, designated by number or letter, and the dimensions and area of each parcel. (Excepted parcels must be marked "Not included in this survey.")

n. The signature and seal of the registered land surveyor responsible for the survey.

o. A memorandum of oaths administered, if any.

5. Where applicable, the signature and seal of the reviewing examining land surveyor [76-3-611(2)(a), MCA].

6. A certificate of survey of a division of land which would otherwise be a subdivision but which is exempted from public review by section 76-3-207, MCA, may not be filed by the county clerk and recorder unless it bears the acknowledged certificate of the

property owner stating that the division of land in question is exempted from review as a subdivision and citing the applicable exemption.

7. A certificate of survey depicting a tract of land of less than 20 acres may not be filed unless it is accompanied by an approval statement from the Department of Health and Environmental Sciences or bears an appropriate and properly executed and acknowledged owner's certificate of exemption from DHES review (sections 76-4-122 and 76-4-125, MCA).

8. All certificates of survey filed under section 76-3-207, MCA, must be accompanied by a certification by the county treasurer that no real property taxes assessed and levied on the land to be subdivided are delinquent [76-3-207(3),MCA].

CERTIFICATES OF SURVEY
CORRECTION SURVEY

Corrections of drafting or surveying errors which do not materially alter the certificate may be made by the submission of a corrected certificate of survey. These documents must conform to the general requirements for certificates of survey (page 9) and must qualify for and cite the exemption which is shown on the original certificate, if any. Also, the surveyor must indicate on the face of the correction certificate the nature of the correction. Corrections which are purely clerical rather than substantive may be made by affidavit.

CERTIFICATE OF SURVEY
RETRACEMENT SURVEY

A retracement survey may be filed when a previously created parcel of land is surveyed and no new division of land occurs. A retracement survey must conform to the general requirements for certificates of survey (page 9). Retracement surveys are exempt from review by the Department of Health and Environmental Sciences. However, the certificate of survey submitted for filing must bear a certification of the property owner in substantially the following form:

> I (We) hereby certify that the purpose of this survey is to retrace the boundary of an existing parcel and that no new or additional parcels are hereby created. Therefore, this survey is exempt from review as a subdivision under both the Montana Subdivision and Platting Act and the Montana Sanitation in Subdivisions Act.

CERTIFICATE OF SURVEY
HIGHWAY PURPOSES

The acquisition of land for state highway purposes is exempt from the requirements of both the Subdivision and Platting Act and the Sanitation in Subdivisions Act if the Highway Department could exercise its power of eminent domain to acquire the property [sections 76-3-201(1) and 76-4-125(2)(a), MCA]. In addition, section 76-3-

209, MCA, exempts divisions of land to be acquired for state highways from the requirements of the MSPA. This section provides that instruments of transfer of land which is acquired by the State for highways may refer by parcel and project number to highway plans. If the parcels are not shown on these plans, the instruments of transfer must be accompanied by and refer to appropriate certificates of survey and plats when they are presented for recording. Divisions of land exempt under section 76-3-209, MCA, but not under section 76-3-201(1), MCA, are subject to review under the Sanitation in Subdivisions Act.

CERTIFICATE OF SURVEY
STATE-OWNED LANDS

Under section 76-3-205, MCA, the division of state-owned lands is exempt from the review and surveying requirements of the MSPA unless the division creates a second or subsequent parcel from a single tract of land for sale, rent, or lease for residential purposes after July 1, 1974. Divisions of land under this section are subject to review under the Sanitation in Subdivisions Act.

CERTIFICATES OF SURVEY, DEEDS, AND OTHER INSTRUMENTS OF TRANSFER FOR PARCELS OVER TWENTY ACRES

Due to changes made by the 1993 Montana Legislature, the two subdivision laws differ in their applicability to parcels of land of different sizes. The Subdivision and Platting Act exempts the creation of parcels of land 160 acres or more in size from its subdivision review requirements (76-3-103 (14) MCA). The Sanitation in Subdivisions Act, in contrast, exempts the creation of parcels of land 20 acres or more in size from its subdivision review requirements. (76-4-102(13).

However, the creation of such unreviewed parcels is subject to the surveying requirements of the Subdivision and Platting Act unless the tracts can be described as consisting of 1/32 or larger aliquot parts of a section or as government lots (section 76-3-401, MCA). When a survey of a tract is necessary, a certificate of survey must be filed with the county clerk and recorder (sections 76-3-404 and 76-3-302, MCA). This document must conform to the standards for certificates of survey (page 11) and should bear a statement on the survey in the following suggested form:

> The purpose of this division of land is to create a parcel of land greater than 160 acres in size which must be surveyed pursuant to section 76-3-401, MCA.

CERTIFICATE OF SURVEY
RELOCATION OF COMMON BOUNDARY OUTSIDE PLATTED SUBDIVISIONS
[SECTION 76-3-207(1)(a), MCA]

A division of land which establishes a new boundary between adjoining parcels of land is exempt from review under the Subdivision and Platting Act. If an approval statement from DHES does not accompany the certificate, the certificate must bear an

acknowledged statement of the property owner, in the form described in #4 (below) invoking the applicable exemption.

In addition to conforming to the general requirements for certificates of survey, certificates of survey claiming the relocation of common boundary line exemption must:

1. Bear the signatures of all landowners whose parcels are modified by the relocation;

2. Show that the exemption was used only to change the location of a boundary line;

3. Clearly distinguish the prior boundary location (shown, for example, by a dashed or broken line or a notation) from the new boundary (shown, for example, by a solid line or notation); and

4. Bear an acknowledged exemption certification by the property owner conveying the land in the following suggested form:

> I (we) hereby certify that the purpose of this division of land is to relocate a common boundary line between adjoining properties outside a platted subdivision and that no additional parcels are hereby created. Therefore, this division of land is exempt from review as a subdivision pursuant to section 76-3-207(1)(a), MCA.

In 1993, the Legislature changed the Montana Subdivision and Platting Act in regards to the common boundary line relocation exemption. Under the old law, all common boundary line relocations were surveyed. Under the new law, most common boundary line exemptions will require a survey, but some will not.

Under the new law, any parcel referenced by the common boundary line relocation exemption which can not be described as consisting of 1/32 or larger aliquot parts, must be surveyed (76-3-401 MCA). Conversely, any parcel referenced under the common boundary line relocation exemption which can be described as consisting of 1/32 or larger aliquot parts need not be surveyed (76-3-401 MCA).

When a survey is not required for parcels referenced under the common boundary line relocation exemption, the property owner's certification statement could be written into the deed or other instrument of transfer. Another alternative is for the County to require the property owner to file a separate common boundary line relocation exemption certification document which would be keyed to and reference the deed or instrument of transfer. (Note: It appears, in most cases, that common boundary relocation exemptions would need to be surveyed. It appears that, rarely, will a situation arise where a boundary relocation can be described as consisting of 1/32 or larger aliquot parts which need not be surveyed.)

CERTIFICATE OF SURVEY
GIFT OR SALE TO MEMBER OF IMMEDIATE FAMILY
[SECTION 76-3-207(1)(b), MCA]

The Subdivision and Platting Act exempts from subdivision review requirements, but not from surveying requirements, divisions of land outside of platted subdivisions for the purpose of a single gift or sale in each County to each member of the landowner's "immediate family." The Attorney General has interpreted the term "immediate family" to include only the spouse of the grantor or the parent or child of the grantor by blood or adoption. Thus, other relatives may not claim the exemption. Also, if there is more than one grantor (e.g. a husband and wife) all of the grantors must bear the necessary family relationship to the grantee(s). These land divisions are, however, subject to review by the Department of Health under the Sanitation in Subdivisions Act if the parcels are less than 20 acres in size.

Certificates of survey of conveyances to immediate family members must conform to the general standards for certificates of survey, must be accompanied by an approval statement from the Department of Health, and must bear an acknowledged statement of exemption (see suggested language below) which indicates the name of the grantee, the relationship of the grantee to the grantor, and the parcel to be conveyed to the grantee.

> I (we) hereby certify that the purpose of this division of land is to transfer Parcel _____ as shown on this certificate of survey to (Name of Grantee), my (our) (father) (mother) (daughter) (son) (wife) (husband). I (we) certify that this is the single (only) gift or sale (I) (we) have made to the aforementioned immediate family member in the County of (Name of County) for the purposes of this exemption. Furthermore, I (we) certify that I (we) am (are) entitled to use this exemption and am (are) in compliance with all conditions imposed by law and regulation on the use of this exemption. Therefore, this division of land is exempt from review as a subdivision pursuant to section 76-3-207(1)(b), MCA.

In 1993, the Legislature changed The Montana Subdivision and Platting Act in regards to surveying family transfer exemptions. Under the old law, all family transfer exemptions were surveyed. Under the new law, some family transfer exemptions will require a survey, some will not.

Under the new law, any parcel created under the family transfer exemption which can <u>not</u> be described as consisting of 1/32 or larger aliquot parts must be surveyed (76-3-401 MCA.) Conversely, any parcel created under the family transfer exemption which <u>can</u> be described as consisting of 1/32 or larger aliquot parts need not be surveyed (76-3-401 MCA.)

When a survey is not required for parcels created under the family transfer exemption, the grantor's certification statement could be written into the deed or other instrument of transfer. Another alternative is for the County to require the grantor to file a separate family transfer certification document which would be keyed to and reference the deed or instrument of transfer.

CERTIFICATE OF SURVEY
AGRICULTURAL EXEMPTION
[SECTIONS 76-3-207(1)(c) AND 76-4-125(2)(c), MCA; AND ARM 16.16.605(1)(h)]

When a tract of ground is created exclusively for agricultural purposes and no buildings requiring water or sewer facilities will be utilized on the tract, the division of land is exempt from review as a subdivision under both the Subdivision and Platting Act and the Sanitation in Subdivisions Act. In order to invoke this exemption the property owner must enter into a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes. This means no dwelling, house or other structure requiring water or sewer may be built. A certificate of survey of a parcel of land created under this exemption must comply with the general standards for certificates of survey and may not be filed by the clerk and recorder unless it is accompanied by a signed and acknowledged copy of the Agricultural covenant. (See Declaration of Agricultural Covenant)

The survey document must also:

Bear an acknowledged landowner's certificate of exemption in the following suggested form:

> I, (we) certify that the purpose of this survey is to create a parcel of land to be used exclusively for agricultural purposes, and that a covenant has been entered into by the parties to the transaction, running with the land and revocable only by mutual consent of the governing body and the property owner, that the land will be used exclusively for agricultural purposes, and that this survey is, therefore, exempt from review as a subdivision pursuant to section 76-3-207(1) (c), MCA.

DECLARATION OF AGRICULTURAL COVENANT

This Declaration, made this ____ day of _____, 19 __, by [Name of Property Owner(s)], hereinafter referred to as the "Declarant(s)";

That whereas, Declarant is the owner of certain property described as tract(s)_____ ____ _____, certificate of survey number _____ on file and of record in the office of the Clerk and Recorder of _____ County, Montana.

Now, therefore, Declarant hereby declares that the parcel(s) described above shall be held, sold, and conveyed in any matter subject to the following covenant, which shall run with the real property and be binding on all parties having any right, title or interest in the described property (properties) or any part thereof, their heirs, executors, successors, administrators, and assignees, and shall bind each owner thereof. This covenant may be revoked by mutual consent of the owners of the parcel(s) in question and the governing body of (Name of City or County). The governing body is deemed to be a party to and may enforce this covenant. TO WIT.

The parcel(s) described above shall be used exclusively for agricultural purposes and no building, house, dwelling, or structure requiring water or sewage facilities may be erected or utilized thereon.

IN WITNESS WHEREOF, the undersigned, being the Declarant(s), herein, has (have) hereunto set his (her) (their) hand(s) this _____ day of _____, 19__.

_____

(Signature of Property Owners)

_____

(Acknowledgment and Notarization)

Note: Any change in use of the land for anything other than agricultural purposes subjects the parcel(s) to review and approval following the procedures established for review of subdivisions [section 76-3-207(2)(b), MCA, and ARM 16.16.605(1)(h)].

In 1993 the Legislature changed the Montana Subdivision and Platting Act in regards to surveying agricultural exemptions. Under the old law, all agricultural exemptions were surveyed. Under the new law, some agricultural exemptions will require a survey, some will not.

Under the new law, any parcel created under the agricultural exemption which can not be described as consisting of 1/32 or larger aliquot parts must be surveyed (76-3-401 MCA.) Conversely, any parcel created under the agricultural exemption which can be described as consisting of 1/32 or larger aliquot parts need not be surveyed (76-3-401 MCA.)

When a survey is not required for parcels created under the agricultural exemption, the landowner's certification statement and covenant could be written into the deed or other instrument of transfer. Another alternative is for the County to require the landowner to file a separate agricultural certification document and covenant which would be keyed to and reference the deed or instrument of transfer.

LOCAL EVASION CRITERIA
(APPLIES TO CERTIFICATE OF SURVEYS AND DEEDS PROPOSING TO DIVIDE LAND)

Several landmark Montana attorney general's opinions and several Montana court decisions have supported the concept of locally established "evasion criteria" for the administration of the Montana Subdivision and Platting Act.

"Evasion Criteria" are locally applied, formally adopted definitions of when the use of exemptions is barred by sections 76-3-201 and 76-3-207, MCA, from the terms of the Act. Local evasion criteria are based upon existing attorney general's opinions and Montana court decisions which have further defined and clarified the exemptions to the MSPA. The adoption of evasion criteria is a local option. A jurisdiction may or may not have adopted criteria. In regard to filing certificates of survey (COS's)or deeds which propose to divide land, locally adopted criteria prohibit filing of a COS or deeds until the local governing body has determined that the use of the claimed exemption is proper and that no evasion of the MSPA proposing to divide land has been attempted. Typically, local criteria specify that a COS or deed may not be filed until it has been found that the COS or deed evidences a proper use of the exemption after formal review by a local government COS review "team" (e.g. sanitarian, planner, attorney, clerk and recorder). The team checks the proposed COS or deed in light of the formal evasion criteria. The COS is either: (1) found to be in conformance with the law and then presented for filing, or (2) found to be an improper use of the exemptions, and rejected from filing as a COS or deed. Frequently, evasion criteria provide for the appeal of a rejection to the governing body. If a rejection is upheld by the governing body, the COS must be resubmitted in the form of a subdivision plat for formal subdivision review.

Thus, it is imperative to know whether formal adopted evasion criteria are in effect in a jurisdiction before one prepares a COS or a deed proposing to divide land and, in the case of the county clerk and recorder, before any COS or deed is accepted for filing. In those jurisdictions which have adopted criteria, it is imperative that the clerk and recorder not file a COS or deed until it has been reviewed by the local government review team.

Because evasion criteria vary from jurisdiction to jurisdiction, no sample criteria have been included in this key. For further information on evasion criteria, contact the Montana Department of Commerce (The Department has published Model Evasion Criteria in the 1994 Edition of The Model Subdivision Regulations.

PART 3: EXEMPTIONS FROM THE MONTANA SANITATION IN SUBDIVISIONS ACT

When a subdivision plat, amended plat, or certificate of survey is presented for filing it must be accompanied by an approval statement from DHES or must bear the certification by the owner that it is exempt from review by DHES. Questions concerning the DHES exemptions should be referred to the local sanitarian or the Subdivision Section of the Water Quality Bureau (444-2406).

The DHES approval statements must specifically address the plat or certificate submitted for filing and encompass all new tracts being created by the survey including so-called "remainder" parcels. The approval statement must be the original, and it must be properly signed with the notarial seal affixed.

Exemption certifications should read substantially as shown below.

Boundary Changes/Aggregation of Lots [ARM 16.16.605(2)(d)]

I (we) hereby certify that the purpose of this division of land is to aggregate existing lots in a platted subdivision. Five or fewer lots are affected, and the lots are currently served by public water and sewer.

Therefore, this division is exempt from review by the Department of Health and Environmental Sciences pursuant to ARM 16.16.605(2)(d).

Acquire Additional Land [Section 76-4-125(2)(b)]

I (we) hereby certify that the purpose of this division of land is to acquire additional land to become part of a parcel that has no sanitary restrictions imposed on it, and that no dwelling or structure requiring water or sewage will be erected on the additional acquired parcel.

Therefore, this division is exempt from review by the Department of Health and Environmental Sciences pursuant to ARM 16.16.605(2)(a)ff.

Correct Construction Errors [ARM 16.16.605(2)(b)]

I (we) hereby certify that the purpose of this division is to correct errors in construction where (buildings) (shrubs) may encroach on neighboring property.

Therefore, this division is exempt from review by the Department of Health and Environmental Sciences pursuant to ARM 16.16.605(2)(b).

Agricultural Exemption (Covenant must be included with submittal) [Section 76-4-125(2)(c)]

I (we) hereby certify that the purpose of this division of land is to create a parcel of land for agricultural or pasture use and that no structure requiring water or sewage facilities has been or will be erected or utilized on the parcel created;

the parties to the transaction have entered a covenant running with the land and revocable only by the governing body and the property owner that the land will remain in agricultural use.

Therefore, this division is exempt from review by the Department of Health and Environmental Sciences pursuant to ARM 16.16.605(1)(h). Any change in land use subjects this division of land to review under the provisions of the Sanitation in Subdivisions Act.

Highway Relocation [ARM 16.16.605(2)(c)]

I (we) hereby certify that the purpose of this survey is to identify the exterior boundaries of a parcel of land divorced from the original tract by highway construction, and (this parcel is to become a part of a contiguous tract) or (this parcel meets the minimum size requirements of the Department of Health and Environmental Sciences).

Therefore, this survey is exempt from review by the Department of Health and Environmental Sciences pursuant to ARM 16.16.605(2)(c).

Utility Siting, Easements, Etc. [Section 76-4-125(2)(c)]

I (we) hereby certify that the purpose of this division of land is to create a parcel to be used for (a) (an) (utility siting) (easement)(parking lot) (park) (gravel pit) (ski lift), and no structures requiring water or sewage disposal will be erected on the parcel so created.

Therefore, this division is exempt from review by the Department of Health and Environmental Sciences pursuant to ARM 16.16.605(2)(e). Any changes inland use subjects this division of land to review under the provisions of the Sanitation in Subdivisions Act.

Subdivisions Within a Master Planned Area (Section 76-4-124, MCA)

A subdivision is not subject to sanitary restrictions and can be filed with the County Clerk and recorder without DHES review when all of the following conditions are met:

1. The subdivision is located totally within a master planned area adopted pursuant to Title 76, Chapter 1, MCA, or within a Class 1 or Class 2 municipality as defined in 7-1-4111 and where no extension of either the municipal water supply system or the municipal sewage disposal system is proposed [76-4-111(3), MCA].

2. In accordance with section 76-4-127, MCA, the local governing body has certified that municipal services for water supply, sewage and solid waste disposal will be provided within one year after notice of certification is issued.

3 The required lot fees as determined in ARM 16.16.803 through 805 have been submitted to the Department.

PART 4: EXEMPTIONS FROM BOTH THE SUBDIVISION AND PLATTING ACT AND THE SANITATION IN SUBDIVISIONS ACT

Certain divisions of land and surveys are entirely exempt from review under both the Subdivision and Platting Act and the Sanitation in Subdivisions Act by sections 76-3-201, and 76-4-125, MCA. These divisions of land need not be surveyed before instruments conveying them may be filed, but a survey may be filed in conjunction with the exemptions listed below if the survey meets the general requirements for form and content for certificates of survey, and the registered land surveyor who prepared the document certifies thereon as to the applicable exemption.

The wholly exempted divisions of land are those which:

1. are created by order of a district court or the supreme court of Montana or by operation of law or which, in the absence of agreement between the parties to the sale could be created by an order of any court in this state pursuant to the law of eminent domain;

2. are created to provide security for construction mortgages, liens, or trust indentures;

3. create an interest in oil, gas, minerals, or water which are severed from the surface ownership of real property;

4. create cemetery lots;

5. are created by the reservation of a life estate;

6. are created by lease or rental for farming and agricultural purposes.

RETRACEMENT SURVEYS ARE WHOLLY EXEMPT.
Likewise, certificates of survey of retracement surveys of existing parcels may be filed without Health Department approval or local subdivision review if they meet the general standards for certificates of survey and bear the surveyor's certification to the effect that no division of land is created by the survey (Refer to page 11 Certificate of Survey, General Requirements).

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APPENDIX F

MODEL EVASION CRITERIA

Comment: Local governments can prevent misuse of the exemptions from local subdivision review by adopting criteria to define proper and improper use of the exemptions. Numerous court cases and Attorney General opinions have provided the legal authority for adopting local evasion criteria. The following resolution is drafted for counties but can be easily tailored to municipalities. Because of 1993 amendments to the Montana Subdivision and Platting Act, Evasion Criteria previously adopted by local governments will need to be amended. The language in italics should be used by jurisdictions that are amending existing Evasion Criteria.

RESOLUTION NO. _____

A RESOLUTION ADOPTING (*REVISED)* CRITERIA FOR LOCAL DETERMINATION OF EVASION OF THE SUBDIVISION AND PLATTING ACT

(WHEREAS, the Resolution Adopting Criteria for Local Determination of Evasion of the Subdivision and Platting Act (the Act) dated _____, 19__, is in need of revision because of legislative changes to the Act and recent Attorney General Opinions and court decisions pertaining to the Act; and)

WHEREAS, the Legislature, in adopting and amending the Subdivision and Platting Act, Section 76-3-101, MCA,et.seq., has presumed: (1) that parcels of land containing less than 160 acres are building sites and that the creation of these parcels should be reviewed and approved by the local governing body applying the primary review criteria set forth in Section 76-3-608, MCA; (2) that the exemptions from subdivision review under Sections 76-3-201, and 76-3-207, MCA are intended to relieve a landowner from the requirements of local review when the division of land either creates no additional building sites or creates so few building sites that only minimal impact will likely result; and (3) that the purpose of the exemptions is not to provide a means of creating numerous building sites without subdivision review but rather to deal with the exceptional circumstance when subdivision review is unnecessary.

WHEREAS, the Montana Supreme Court decisions in *Florence-Carlton School District v. Ravalli County Board of Commissioners*, 1978; *Leach v. Visser*, 1989; and *State ex rel. Dreher v. Fuller*, 1993; has recognized a county's right to narrowly interpret and enforce the provisions of the Montana Subdivision and Platting Act, especially those

pertaining to the use of exemptions; and

WHEREAS, the parcels of land created by exemptions often do not provide for: (1) the coordination of roads within the divided land or with other roads, both existing and planned; (2) the dedication of land for roadways and public utility easements; (3) the provision of adequate open spaces, for travel, light, air and recreation; (4) the provision of adequate transportation, water drainage, and sanitary facilities; (5) the minimizing of congestion; (6) the avoidance of land division that would involve unnecessary environmental degradation; and (7) the avoidance of danger or injury to health, safety or welfare by reason of natural hazard or the lack of water, drainage, access, transportation, schools or other public services, or would necessitate an excessive expenditure of public funds for the supply of such services; and

WHEREAS, the likelihood that land development problems will occur is greatly increased when building sites are created without public review and are further divided without public review; and

WHEREAS, the Commissioners of _____ County have established the necessary procedures for expedient review of subdivisions creating five or fewer parcels and thus have diminished the justification for avoiding review through use of exemptions.

NOW THEREFORE BE IT RESOLVED, that _____ County adopts the following criteria (*that shall supersede those adopted by _____ County on _____ __, 19__, and the criteria)* shall guide the County Commissioners in determining when the use of an exemption from subdivision review is adopted to evade the purpose of the Subdivision and Platting Act:

A. PROCEDURES AND GENERAL REQUIREMENTS

1. Any person seeking exemption from the requirements of the Subdivision and Platting Act (76-3-101 *et seq.*, MCA) shall submit to the Clerk and Recorder (1) a certificate of survey, or where a survey is not required, an instrument of conveyance, and (2) evidence of, and an affidavit affirming, entitlement to the claimed exemption.

2. When a certificate of survey or instrument of conveyance is submitted to the County Clerk and Recorder, the Clerk and Recorder shall cause the documents to be reviewed by the designated agents of the governing body: (the county planner, sanitarian and clerk and recorder). The agents shall review the proposed land division to determine whether it complies with the requirements set forth in this Resolution, the Montana Subdivision and Platting Act, and the Montana Sanitation in Subdivisions Act.

3. After the review to evaluate compliance with the requirements contained in this Resolution, the agents shall submit a written determination whether the use of the exemption is intended to evade the purposes of the Act.

4. If the designated agents find that the proposed use of the exemption complies with the statutes and these criteria, they shall advise the clerk and recorder to file the certificate of survey or record the instrument of conveyance and accompanying documents. If the agents find that the proposed use of the exemption does not comply with the statutes and these criteria, they shall advise the clerk and recorder to not file or record the documents, and the clerk shall return the materials to the landowner.

5. Any person whose proposed use of exemption has been denied by the designated agents because the use of the exemption raised a rebuttable presumption established by these guidelines may appeal the agents' decision to the County Commissioners. The person may request a hearing, and may submit additional evidence to show that the use of the exemption in question is not intended to evade the Act, and, thereby overcome the rebuttable presumption.

If the governing body concludes that the evidence and information overcomes the presumption that the exemption is being invoked to evade the Act, they may authorize the use of the exemption in writing. A certificate of survey claiming such an exemption from subdivision review, which otherwise is in proper form, may be filed (or an instrument of conveyance recorded) if it is accompanied by written authorization of the governing body.

6. Advisory Examination. Landowners or their representatives are encouraged to meet with the County's designated agents to discuss whether a proposed land division or use of an exemption is in compliance with these criteria.

The agents may issue an advisory opinion only, and the opinion creates no commitment on the local officials when the documents creating the proposed land division are submitted to the Clerk and Recorder.

7. The County Commission and its agents, when determining whether an exemption is claimed for the purpose of evading the Act, shall consider all of the surrounding circumstances. These circumstances may include but are not limited to: the nature of the claimant's business, the prior history of the particular tract in question, the proposed configuration of the tracts if the proposed exempt transaction are completed, and any pattern of exempt transactions that will result in the equivalent of a subdivision without local government review (*State ex rel. Dreher v. Fuller*, 50 St. Rptr 454, 1993).

8. To assist in the implementation of this review process and to monitor those parcels by exemption, the clerk and recorder shall cause the following letter system to be added to the numbering of recorder certificates of survey filed after the effective date of this resolution.

CO ... Court order (76-3-201(1), MCA)
ME ... Mortgage Exemption (76-3-201(2), MCA)
LE ... Life Estate (76-3-201(5), MCA)

BA ... Boundary Adjustment(76-3-207(a), MCA)
FC ... Family Conveyance (76-3-207(b), MCA)
AE ... Agricultural Exemption (76-3-207(c), MCA)
OS ... Occasional Sale (76-3-207(d), MCA) [used prior to April 6, 1993]
AL ... Aggregation of Lots (76-3-207(e), MCA)

Comment: These are suggested prefixes for certificates of survey. Each county may have its own system of tracking exemptions.

9. Exempt divisions of land that would result in a pattern of development equivalent to a subdivision shall be presumed to be adopted for purposes of evading the Act. A "pattern of development" occurs whenever 3 or more parcels of less than 160 acres with common covenants or facilities have been divided from the original tract.

B. EXEMPTION AS A GIFT OR SALE TO A MEMBER OF THE IMMEDIATE FAMILY (76-3-207(1)(b), MCA)

1. Statement of Intent: The intention of this exemption is to allow a landowner to convey one parcel to each of member of the immediate family without local subdivision review. A single parcel may be conveyed to each member of the immediate family under this exemption in each county where the landowner owns property.

2. The Attorney General has defined "immediate family" as the spouse, children or parents of the grantor.

3. Filing of any certificate of survey (or recording of an instrument of conveyance) that would use this exemption to create a parcel for conveyance to a family member must show the name of the grantee, relationship to the landowner, and the parcel to be conveyed under this exemption, and the landowner's certification of compliance. Also, the certificate of survey or instrument of conveyance shall be accompanied by a deed or other conveying document.

4. One conveyance of a parcel to each member of the landowner's immediate family is eligible for exemption from subdivision review under this Resolution. However, the use of the exemption may not create more than one remaining parcel of less than 160 acres.

5. Any proposed use of family conveyance exemption to divide a tract that was created through use of an exemption will be presumed to be adopted for purposes of evading the Act. This presumption is in effect regardless of previous ownership of the tracts and pertains to remaining tracts of less than 160 acres as well as to those tracts that were created through the exemptions.

6. The use of the family conveyance exemption to divide tracts that were created as part of an overall development plan with such characteristics as common roads, utility

easements, restrictive covenants, open space or common marketing or promotional plan shall be presumed to be adopted for purposes of evading the Act.

C. EXEMPTION TO PROVIDE SECURITY FOR A CONSTRUCTION MORTGAGE, LIEN OR TRUST INDENTURE 976-3-201(2), MCA)

1. Statement of Intent: Under policies of many lending institutions and federal home loan guaranty programs, a landowner who is buying a tract with financing or through a contract for deed is required to hold title to the specific site on which the residence will be built. The intended purpose of this exemption is to allow a landowner who is buying a tract using financing or contract for deed to segregate a smaller parcel from the tract for security for financing construction of a home on the property.

2. When this exception is to be used, the landowner shall submit to the clerk and recorder:

a. a statement of how many parcels within the original tract will be created by use of the exemption;

b. the deed, trust indenture or mortgage for the exempt parcel (which states that the tract of land is being created only to secure a construction mortgage, lien or trust indenture).

c. a statement explaining who will have title to and possession of the balance of the original parcel after title to the exempted parcel is conveyed.

d. a signed statement from a lending institution that the creation of the exempted parcel is necessary to secure a construction loan for buildings or other improvements on the parcel.

3. The use of this exemption is presumed to have been adopted for the purpose of evading the Act if:

a. it will create more than one building site; or

b. the financing is not for construction on the exempted parcel; or

c. the person named in the statement explaining who would have possession of the remainder parcel if title to the exempted parcel is conveyed is anyone other than the borrower of funds for construction.

d. title to the exempted parcel will not be initially obtained by the lending institution if foreclosure occurs.

e. it appears that the principal reason the parcel is being created is to create

a building site and using the parcel to secure a construction loan is a secondary purpose.

D. EXEMPTION FOR AGRICULTURAL PURPOSES (76-3-207[C], MCA)

1. Statement of Intent: The intention of this exemption is to allow a landowner to create a parcel without local review where the parcel will be used only for production of livestock or agricultural crops and where no residential, commercial or industrial buildings will be built.

2. "Agricultural purpose," for purposes of these evasion criteria, means the use of land for raising crops or livestock, or for the preservation of open space, and specifically excludes residential structures and facilities for commercially processing agricultural products. Agricultural lands are exempt from review by the DHES, provided the applicable exemption is properly invoked by the property owner.

3. The following conditions must be met or the use of the exemption will be presumed to have been adopted for the purposes of evading the Act:

a. The parties to the transaction must enter into a covenant running with the land and revocable only by mutual consent of the county commissioners and the property owner that the divided land will be used exclusively for agricultural purposes or open space. The covenant must be signed by the property owner, the buyer or lessee and the county commissioners.

b. The landowner must demonstrate that the planned use of the exempted parcel is for agricultural purposes and that no residential, commercial or industrial buildings will be built (e.g., a statement signed by the buyer).

c. Any change in use of the land for anything other than agricultural purposes subjects the parcel to review as a minor subdivision.

d. Residential, commercial and industrial structures, including facilities for commercial processing of agricultural products are excluded uses on parcels created under this exemption unless the covenant is revoked.

E. RELOCATION OF COMMON BOUNDARY (76-3-207[a],MCA)

1. Statement of Intent: The intended purpose of this exemption is to allow a change in the location of a boundary line between two parcels and to allow a one-time transfer of a tract to effect that change in location without subdivision review.

2. Certificates of survey claiming this exemption must clearly distinguish between the existing boundary location and the new boundary. This shall be accomplished by

representing the existing boundary with a dashed line and the new boundary with a solid line. The appropriate certification must be included on the certificate of survey.

3. If the relocation of a common boundary would result in the permanent creation of an additional parcel of land, the division of land must be reviewed as a subdivision.

F. REMAINDER PARCELS

1. Statement of Intent: A "remainder" parcel is that part of an original tract that is left following the segregation of other parcels from the tract for the purpose of transfer. A "remainder" may not be created for the purpose of conveyance and must be retained by the owner. A "remainder" that is created by the segregation of a subdivision from a larger original tract is not part of the subdivision nor is it subject to the surveying requirements of the MSPA. Although the term "remainder" does not appear in the MSPA, the possibility that remainder parcels may exist is implicit in the express provisions of the MSPA (Attorney General Letter opinion to Robert McCarthy, April 22, 1987).

2. A landowner claiming that a parcel is a "remainder" must present evidence that the parcel is in fact intended to be retained and is not to be sold or transferred. Examples of such evidence include the existence of the landowner's residence on the parcel; building plans for a structure to be built by or for the landowner;

DATED this _____day of _____, 19_____

BOARD OF _____ COUNTY COMMISSIONERS

_____
Chairman

_____

_____

Commentary on Model Evasion Criteria

The model evasion criteria presented in this Appendix offer many provisions to ensure that use of the exemptions from local subdivision review are proper. Local officials, of course, may include changes to suit their particular jurisdiction and encourage public acceptance. A number of comments on the following evasion criteria are appropriate.

1. The "WHEREAS" section establishes the justification for the evasion criteria: the problems, need and legal authority. Citing the legal decisions or opinions that provide legal support for local evasion criteria assists the reader and strengthens the local government's position.

2. Having designated agents (e.g., subdivision administrator, sanitarian, or county attorney) examine a certificate of survey showing an exemption greatly aids the clerk and recorder in maintaining proper records. The governing body can elect to delegate approval of exemptions to its agent(s), or can make the final determination itself, using the recommendation of the agent(s). The model criteria incorporate a process in which the agent makes the determination, and that decision may be appealed to the governing body.

3. The model contains a provision that encourages landowners to meet with the designated agent(s) to determine whether a planned use of an exemption would be acceptable under the local evasion criteria. Under that provision the designated agent(s) give the landowner an advisory opinion regarding the propriety of a proposed use of an exemption. The configuration or conditions surrounding the use of the exemption may be significantly different when the landowner submits the certificate of survey. By keeping a copy of the sketch and information used in making the advisory opinion, the agent(s) minimize potential disagreement over that opinion when the certificate of survey is submitted for filing.

The agent(s) issue an advisory opinion only, and that opinion does not commit the governing body when the actual certificate of survey is submitted.

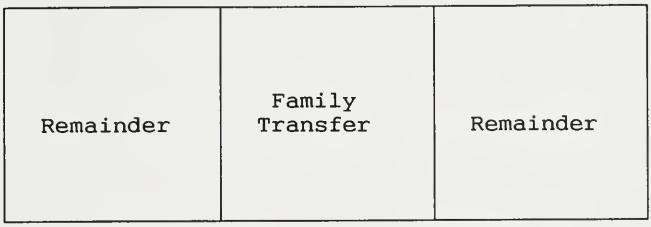
The agent(s) must use care that landowners, surveyors or others do not overuse or abuse this service and consume an excessive amount of time by requesting an inordinate amount of advisory opinions.

4. The model evasion criteria involve only explicit standards for determining whether use of an exemption is intended to evade the Act. No subjective judgement is needed to determine whether a proposed use of an exemption complies with the criteria.

5. Reasonable and justifiable limits on use of exemptions probably can be placed on persons in the land development business. Land developers, real estate agents, and other in the business of dividing land for marketing have a right to use the exemptions

in the same manner as any other person. However, repeated uses of exemptions to create lots for marketing by land development professionals goes beyond the legislative intent of the MSPA.

6. The provision that denies two or more remaining parcels after use of the "family conveyance" exemptions prevents taking the exempted parcel out of the middle of a tract and leaving two or more additional parcels.



7. Under an Attorney General opinion (Letter opinion to Robert McCarthy, Esq., April 22, 1987), a remainder parcel may be created as a result of segregating parcels for purpose of transfer with a certificate of survey. However, the remainder parcel may not have been created for the purpose of sale or transfer, and therefore may not be conveyed. Should the land owner wish to sell or convey a remainder parcel, he must either use an applicable exemption, or have the parcel approved as a subdivision lot.

8. The model evasion criteria require that persons claiming the exemption for a "family conveyance" must submit a deed or other instrument of conveyance to ensure that the land division is actually for a legitimate transfer to a member of the immediate family.

9. The agricultural exemption has caused many problems. Most of those can be prevented at the time the certificate of survey is submitted. First, the model evasion criteria restrict agricultural uses to the raising of crops or livestock. Houses and other residential structures and facilities for processing agricultural products are not permitted as agricultural uses.

Second, the model also requires the landowner to demonstrate that the exempted parcel will be used for agricultural purposes. The local officials can satisfy themselves that the buyer plans a use of the property that truly is agricultural.

10. The suggested letter code incorporated into the certificate of survey numbering system allows ready monitoring of the exemptions when deeds or other instruments are submitted for recording.

APPENDIX G

SAMPLE ENVIRONMENTAL ASSESSMENT

Two sample environmental assessments are included in this manual, one for a proposed Recreational Vehicle Park and the other for a development including both condominiums and townhouses. Both assessments were included to make the reader familiar with two different types of subdivisions having different impacts. For example, Sunset Point is proposed to be located on the outskirts of a small unincorporated town and is proposed to be served by the town's public water and sewer system. On the other hand, Stageline Campground is proposed to be served by a new privately owned water and sewer system (a large pressurized drainfield and a well with distribution system). Other differences between the two would be additional taxes to the county and impacts on the school systems. The Sunset Point development should generate substantially more taxes, because it is a residential subdivision, than Stageline Campground which would be used only on a seasonal basis by a transient population. Furthermore, the Campground should have no impacts on the school system whereas Sunset Point should contribute some children to the system.

It is recommended that the subdivision administrator also do some research on questions asked in the Environmental Assessment as the information presented could be "slanted" to make the proposal appear in the best light possible. Sending out the Environmental Assessment to different agencies as part of the referral process could act as a check for information presented in the assessment.

ENVIRONMENTAL ASSESSMENT

SUNSET POINT

BIG FORK, MONTANA

Prepared by
ABC Incorporated

SUNSET POINT

ENVIRONMENTAL ASSESSMENT

Statement of Information

The following statement is made and submitted with the preliminary plat of a proposed land subdivision in Big Fork County, Montana.

NAME, ADDRESS, TELEPHONE NUMBER OF LANDOWNER

NAME, ADDRESS, TELEPHONE NUMBER OF DEVELOPER

NAME, ADDRESS, TELEPHONE NUMBER OF INDIVIDUAL(S) OR FIRM(S) PROVIDING NECESSARY INFORMATION

PROJECT ARCHITECT PROJECT SURVEYOR PROJECT ENGINEER

SIGNATURE OF THE LANDOWNER OR RESPONSIBLE OFFICIAL OF THE COMPANY OR CORPORATION OFFERING THE LAND FOR SALE, ATTESTING TO THE VALIDITY OF THE INFORMATION PROVIDED.

_____

(Date) _____

SUNSET POINT

ENVIRONMENTAL ASSESSMENT

I. GEOLOGY

A. Locate on a copy of the preliminary plat:

1. Any known hazards affecting the development which could result in property damage or personal injury due to:

a. Falls, slides or slumps – soil, rock, mud, snow.

There are no known falls, slides, or slumps on the site. Soils of the upper levels of the site are comprised of topsoil approximately 0.5 feet thick over 2.0 to 4.5 feet of overburden glacial till on an unknown thickness fractured argillite bedrock of the precambrian series.

The lower portion of the property has 0.5 feet of topsoil over alluvial deposits of silts and sands over course grained alluvial soils consisting of dense sandy gravel.

b. Seismic activity.

The map of the surface geology for Montana indicates a probable fault line approximately two miles south. Historically, two minor earth tremors have been recorded at 2.5 and 4.0 on the Richter scale. Epicenters are approximately 1 mile south of the development.

2. Any rock outcropping.

A predominant feature of the site topography is a rock outcrop through the middle of the property. The site is thus divided into two distinct levels of access. This feature is exhibited in the topographic mapping and has been incorporated in the site design.

B. Describe any proposed measures to prevent or reduce the danger of property damage or personal injury from any of these hazards.

Although no apparent hazard exists, the site design places the 20 unit condominium in front of the rock outcrop thus restricting pedestrian access and effectively reducing the possibility of personal injury.

II. Surface Water

Locate on a copy of the preliminary plat:

A. Any natural water systems such as streams, rivers, intermittent streams, lakes or marshes (also indicate the names and size of each).

Teton Lake frontage shown on site plan.

B. Any artificial water systems such as canals, ditches, aqueducts, reservoirs, and irrigation systems (also indicate the names, sizes, and present uses of each).

Artificial water scape is planned. Se Preliminary Plat.

C. Any areas subject to flood hazard, or if available, 100 year flood plain maps (using best available information).

Property is above 100 year high pool for Teton Lake.

III. VEGETATION

A. Locate on a copy of the preliminary plat the major vegetation types within the subdivision (e.g., marsh, grassland, shrub, and forest).

The project area has been previously cleared, developed, and landscaped. There is no significant vegetation on the property. The natural environment was previously changed.

B. Describe the amount of vegetation that is to be removed, or cleared, from the site, and state the reasons for such removal.

Existing landscape plan will be modified to provide proper storm water drainage and accommodate new streets, parking, and structures. Entire area will be re-landscaped.

C. Describe any proposed measures to be taken to protect vegetative cover.

Mature trees that conform to development plan will be preserved.

IV. WILDLIFE

A. What major species of fish and wildlife, if any, use the area to be affected by the proposed subdivision?

No major species rely on the existing development as primary habitat.

B. Locate on a copy of the preliminary plat any known important wildlife areas, such as big game winter range, waterfowl nesting areas, habitat for rare and endangered species, and wetlands.

Due to the lack of trees and the existing buildings on the site, the proposed subdivision should have no significant adverse effect on wildlife or wildlife habitat.

C. Describe any proposed measures to protect wildlife habitat or to minimize habitat degradation.

Landscaping will be provided.

V. AGRICULTURE AND TIMBER PRODUCTION

A. State the acreage, type, and agricultural classifications of soils on the site.

The proposed subdivision site is designated as Class VI soils. Only Class I through Class IV are considered as prime farmlands. The site is not in any active farming and is not suited for commercial farming because of its size, soils, rock outcroppings, and topography.

B. State the history of production of this site by crop type an yield.

None of record.

C. State the historical and current agricultural uses which occur adjacent to the site.

None of record.

D. Explain any steps which will be taken to avoid or limit development conflicts with adjacent agricultural uses.

None required.

E. If the site is timbered, state any timber management recommendations which may have been suggested or implemented by the U.S.D.A. Division of Forestry in the area of this proposal.

Site is not timbered.

VI. HISTORICAL, ARCHEOLOGICAL, OR CULTURAL FEATURES

A. Locate on a copy of the preliminary plat any known or possible historical, archeological, or cultural sites which exist on or near the site.

No known Historical, Archeological, or cultural features exist on the proposed site.

B. Describe the sites delineated on the preliminary plat.

Does not apply.

C. Describe any measures that will be taken to protect such sites or properties.

Does not apply.

VII. SEWAGE TREATMENT

A. For a proposed public or community sewage treatment system:

1. State the average number of gallons of sewage generated per day by the development when fully developed.

Estimated sewage flow is 13,500 gallons per day (gpd).

2. Where an existing system is to be used:

a. Identify the system and the person, firm, or agency responsible for its operation and maintenance.

Big Fork Municipal Sewer System. Big Sky County Sewer District No. 3.

b. Indicate the system's capacity to handle additional use and its distance for the development.

Since the planned development will eliminate 11,800 gallons per day of sewage from existing development on the property and considerable infiltration resulting from groundwater intrusion, the planned development is not expected to increase sewage load.

Big Fork sewer lines currently bisect on the property.

c. Provide evidence that permission to connect has been

granted.

Application for system improvements to serve this development is currently being considered by Big Fork Sewer District.

Proposed relocation of sewer lines are shown on the utility plan.

VIII. WATER SUPPLY

A. Where a public or community water system is proposed:

1. Estimate the number of gallons per day required by the development (including irrigation, if applicable).

   Domestic flow is 20,250 gpd and irrigation peak flow is 27,000 gpd.

2. Where an existing system is to be used:

   a. Identify the system and the person, firm, or agency responsible for its operation and maintenance.

      Big Fork Water System.
      Pacific Power & Light, John Doe Operator

   b. Indicate the system's capacity to handle additional use and its distance from the development.

      The planned development will eliminate a comparable water demand therefore little if any net increase in water demand is anticipated.

      Pacific Power & Light water mains currently serve the property.

   c. Provide evidence that permission to connect has been granted.

      Application for system improvements and revised water service is currently being prepared.

      Proposed relocation of water lines are shown on the utility plan.

IX. SOLID WASTE

A. Describe the proposed method of collecting and disposing of solid waste from the development.

The solid waste will be collected in two locations on the project and removed by a private collector to the Big Sky County Dump or other approved Dump Site.

B. If central collection areas are proposed within the subdivision, show their location on a copy of the preliminary plat.

Shown on Utility Plan

C. If use of an existing collection system or disposal facility is proposed, indicate the name and location of the facility.

Does not apply

X. DRAINAGE

A. Streets and Roads.

1. Describe any proposed measures for disposing of storm runoff from streets and roads.

Storm water will be channelled and collected at sod lined detention basins integrated into the landscape plan. After sedimentation, treatment flows will be routed to appropriate discharge points through the shoreline headwall. Catch basins and drop pipes will be used to prevent erosion.

2. Indicate the type of road surface proposed.

All road surfaces will be hot mix asphaltic cement.

3. Describe any proposed facilities for stream or drainage crossing (i.e., culverts, bridges).

Culverts, catch basins, and storm sewers will be utilized where required to carry out the drainage plan.

B. Other Areas

1. Describe how surface runoff will be drained or channelled from lots

or common areas.

Answered above in A.1. and drainage plan.

2. Indicate if storm runoff will enter surface waters and describe any proposed treatment measures.

   Answered above in A.1. and drainage plan.

3. Describe any proposed sedimentation and erosion controls to be utilized both during, and after, construction.

   During construction, temporary silt fences will be constructed utilizing straw bales staked into place.

   Construction will be scheduled to minimize area of disturbance. Temporary sedimentation basins will be constructed where flows into the lake cannot be avoided.

4. Attach a copy of the plat showing how drainage on lots, road and other areas will be handled (include sizes and dimensions of ditches, culverts, etc.).

   Plan is attached.

XI. ROADS

A. Estimate how much daily traffic the development, when fully developed, will generate on existing or proposed roads providing access to the development.

At 100 percent occupancy the development will increase the number of vehicle trips per day by 20 trips per day.

Planned 45 units @ 4 Trips/Day	=	180
Current Land Uses @ 4 Trips/Day	=	160
Net Increase	=	20 Trips/Day

1. Discuss the capability of existing and proposed roads to safely accommodate this increased traffic (e.g., conditions of the road, surface, and right-of-way widths, current traffic flows, etc.).

   Roads within the development are to be redesigned providing adequate parking and turn around areas.

The existing boat ramp will be removed as well as 9 R.V. rental spaces. Long towing units and R.V. vehicles will be eliminated.

The intersection hazard at the approach to Highway 50 will be considerably reduced.

2. Describe any increased maintenance problems and costs that will be caused by this increase in volume.

The net increase in volume will be minimal.

B. Indicate who will pay the cost of installing and maintaining dedicated and/or private roadway.

The Home Owners' Association will maintain private roadways.

C. Describe the soil characteristics, on site, as they relate to road and building construction and measures to be taken to control erosion of ditches, banks, and cuts as a result of proposed construction.

Entire project area not paved will be landscaped. Comprehensive site drainage plan will control erosion.

No major cut areas are anticipated.

D. Explain why access was not provided by means of a road within the subdivision if access to any of the individual lots is directly from City, County, State, or Federal roads or highways.

Not applicable.

E. Is year–round access by conventional automobile over legal right–of–ways available to the subdivision and to all lots and common facilities within the subdivision?

Yes.

F. Identify the owners of any private property over which access to the subdivision will be provided.

Not applicable.

XII. EMERGENCY SERVICES

A. Describe the emergency services available to the residents of the proposed subdivision including the number of personnel and number of vehicles and/or type of facilities for:

1. Fire Protection

   a. Is the proposed subdivision in an urban or rural fire district? If not, will one be formed or extended?

      Yes. Fire protection will be provided by the Big Fork Volunteer Fire Department.

   b. In absence of a fire district, what fire protection procedures are planned?

      Does not apply.

   c. Indicate the type, size, and location of any proposed recharge facilities.

      Does not apply.

   d. If fire hydrants are proposed, indicate water pressure capabilities and the locations of hydrants.

      Fire hydrants are to be provided as shown on Utility Plan. Minimum pressure is 55 PSI.

2. Police Protection.

   Police protection will be provided by the Big Sky County Sheriff's Department.

3. Ambulance Service.

   Ambulance service will be provided by the Melrose[1] Ambulance and the Alert Helicopter and in conjunction with the Big Fork Quick Response Unit.

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[1]Melrose is the nearest incorporated area. It is approximately 15 miles from Big Fork.

4. Medical Services.

Medical services will be provided by the Melrose Regional Hospital.

B. Can the needs of the proposed subdivision for each of the above services be met by present personnel and facilities?

Yes

1. If no, what additional expense would be necessary to make these services adequate?

Does not apply.

2. At whose expense would the necessary improvements be made?

Does not apply.

XIII. SCHOOLS

A. Describe the educational facilities which would serve the subdivision (school facilities, school personnel, bus routes and capacities, etc.).

The subdivision will be served by the Big Fork public schools, both elementary and secondary. Bus route is along Highway 50. The development is within easy physical walking distance (approximately 1/4 mile) from Big Fork schools.

B. Estimate the number of school children that will be added by the proposed subdivision, and how they will affect existing facilities.

At 25% occupancy the development will add 3 school children.

AT 90% occupancy the development will add 12 school children.

Experience at a similar development (Mountain Harbor Condominiums) indicates this estimate is very high. Mountain Harbor has 80 units. It is nearly complete and has only three school children in the Big Fork system.

This development should not affect the existing Big Fork School System.

XIV. ECONOMIC BENEFITS

A. Provide the present assessment classifications and range of the total assessed valuation of all land and structures.

Existing assessment classification is commercial.

Total assessed valuation of all land and structures is $230,115.00.

B. Provide the anticipated assessment classification and range of the total assessed valuation of all structures (at 25% and 90% occupancy – also give estimated year of said occupancy):

Anticipated classification is residential.

Total assessed valuation and projected tax revenue are computed as follows:

	CONDOMINIUMS	TOWNHOUSE
Number	30	15
Market Value Each	$ 120,000	$ 160,000
Total Market Value	3,600,000	2,400,000
Tax Value (x.0855)*	307,800	205,200
Tax Assessment (x.231)*	71,100	47,400
25% Occupancy (year 1988)	17,775	11,850
90% Occupancy (year 1992)	63,990	42,660

*County Assessor

C. Provide anticipated revenue increases per unit, from water, sewer, and solid waste fees.

ANTICIPATED INCREASE IN WATER SYSTEM REVENUES PER UNIT:

Pacific Power & Light estimates $180.00 per unit per year.

ANTICIPATED INCREASE IN SEWER SYSTEM REVENUES PER UNIT:

Same as existing use.

ANTICIPATED INCREASE IN SOLID WASTE REVENUES PER UNIT:

12.50/year.

XV. LAND USE

A. Describe the historical use of the site.

Mobile Home Park, R.V. Park, Motel and Resort.

B. Describe any comprehensive plan recommendations and other land use regulations on and adjacent to the site. Is zoning proposed? If located near an incorporated city or town, is annexation proposed?

The adopted Comprehensive Plan classifies the site as Urban Residential (4–6 units per acre).

Site is unzoned. Could be zoned Resort/Residential. Big Fork is unincorporated.

C. Describe the present uses of lands adjacent to or near the proposed development. Describe how the subdivision will affect access to any adjoining land and/or what measures are proposed to provide access.

South – Bearpaw State Park
North – Residential
East – Vacant
West – Teton Lake

No access restrictions will exist. Easement to Bearpaw State Park will be honored.

D. Describe the basis of the need for the subdivision. How much development of a similar nature is, or is not, available in the area?

Considerable demand for residential recreation property exists in the Big Fork area.

Mountain Harbor was developed over the last five years. That development is nearly sold out.

E. Describe any health or safety hazards on or near the subdivision – mining activity, high voltage lines, gas lines, agricultural and farm activities, etc. Any such conditions should be accurately described and their origin and location identified.

None known to exist.

F. Describe any on–site uses creating a nuisance, such as unpleasant odor, unusual noises, dust, smoke, etc. Any such conditions should be accurately described and their origin and location identified.

None known to exist.

XVI. PARKS AND RECREATION FACILITIES

A. Describe park and recreation facilities to be provided within the proposed subdivision and other recreational facilities which will serve the subdivision.

.236 acres of Homeowners' Park will be set aside by easement.

The following amenities will be provided:

1. Docks for boating, swimming, and water sports.
2. Barbecue Pit.
3. Club House with indoor activities.
4. Exterior Spa.
5. Children's playground equipment.

B. List other parks and recreation facilities or sites in the area and their approximate distance from the site.

Bearpaw State Park on south boundary of subdivision.

C. If cash–in–lieu of parkland is proposed, state the purchase price per acre or current market value (values stated must be no more than 12 months old).

Does not apply.

ENVIRONMENTAL ASSESSMENT
STAGELINE CAMPGROUND

GENERAL The proposed Stageline Campground will provide a needed service in the Big Fork area. Several levels of service will be provided which will range from fully serviced parking spaces with water, sewer, and power for the more sophisticated RV's to spaces with a tent space and shared barbecue pit.

Preliminary plans are to provide approximately 50% of the spaces with full services, 40% with power and the remaining 10% with a parking space, tent erecting area and a shared barbecue pit.

This proposal also includes a building which will house showers and rest rooms for those campers who will require these services. In addition a small convenience store and self-service laundromat will eventually be housed in the building. A small area within the building will be used as a registry and business office.

Immediately adjacent to the building will be a RV dump station and a watering station. Pay telephones will be available inside the laundromat room.

Maintenance and full time caretaking services will be provided by the owners who live on the property adjacent and immediately to the north of the campground.

To insure a minimum impact on the neighbors a set of campground rules will be developed and posted in highly visible places. These rules will prohibit loose pets, loud or abusive language, and other items not conductive to the tranquility of the area. Violators will be ejected from the campground and/or reported to the County Sheriff's Office.

This campground will require licensing by the Food & Consumer Safety Bureau of the State Department of Health and therefore all requirements of ARM title 16, Chapter 10, Subchapter 7 will be adhered to.

I. GEOLOGY

A. Locate on a copy of the preliminary plat:

1. Any known hazards affecting the development which could result in property damage or personal injury due to:

a. Falls, slides or slumps – soil, rock, mud, snow.

The proposed site is gently rolling with approximately 60% being logged-over forest and the remainder in pasture. There are no known falls, slides, or slumps on the site.

b. Seismic activity.

Based on information on file in the office of the Bureau of Geology ad Mines, there is no seismic activity in the vicinity of the site.

2. Any rock outcropping.

There are no rock outcroppings on the site.

B. Describe any proposed measures to prevent or reduce the danger of property damage or personal injury from any of these hazards.

During construction the developer will remove any trees that may prove hazardous to public health and safety.

II. Surface Water

Locate on a copy of the preliminary plat:

A. Any natural water systems such as streams, rivers, intermittent streams, lakes or marshes (also indicate the names and sizes of each).

The nearest surface water to the site is the Monroe River which is one-half mile west of the site. Development of this site should have no adverse effects on the river.

B. Any artificial water systems such as canals, ditches, aqueducts, reservoirs, and irrigation systems (also indicate the names, sizes, and present uses of each).

None existing on or adjacent to the site.

C. Any areas subject to flood hazard, or if available, 100 year flood plain maps (using best available information).

Based on available floodplain maps, this area is not within a 100 year floodplain.

III. VEGETATION

A. Locate on a copy of the preliminary plat the major vegetation types within the subdivision (e.g., marsh, grassland, shrub, and forest).

The boundary of the forested area is shown on the preliminary plat plan.

This area is typical of logged forest land. Immature fir, larch and spruce were observed in this area. The pasture area is void of trees and appears to have only a limited variation of grasses.

B. Describe the amount of vegetation that is to be removed, or cleared, from the site, and state the reasons for such removal.

A certain amount of clearing will be necessary to construct the roads, utilities, parking, and tent areas. Other trees will be removed to insure safety, however, the area will be enhanced by providing a minimum amount of disturbance to the natural setting. The last phase of development may include planting of additional trees and plants to provide a more pleasant setting.

C. Describe any proposed measures to be taken to protect vegetative cover.

See section III B. of this Environmental Assessment.

IV. WILDLIFE

A. What major species of fish and wildlife, if any, use the area to be affected by the proposed subdivision?

Small animals and birds were observed on the site during the site work. This development will not disturb these species. After development, habitat for these species will still be available on the site.

B. Locate on a copy of the preliminary plat any known important wildlife areas, such as big game winter range, waterfowl nesting areas, habitat for rare and endangered species, and wetlands.

According to the Department of Fish, Wildlife, and Parks, the site does not provide habitat for big game nor is it a waterfowl nesting area or habitat for rare and endangered species.

C. Describe any proposed measures to protect wildlife habitat or to minimize habitat degradation.

None proposed. See Section IV A of this Environmental Assessment.

V. AGRICULTURE AND TIMBER PRODUCTION

A. State the acreage, type, and agricultural classifications of soils on the site.

The site consists of approximately 3 acres of forest land and 2 acres of

pasture. The Soil Conservation Service classified the site as Half Moon – Haskill Complex which is a fine sandy loom. These soils fall within Class IV capability. Class I through IV soils are considered prime farmland. Refer to the attached soils report by Environmental Consultants (Exhibit A).

B. State the history of production of this site by crop type an yield.

Historically the site has been partially in timber and partially used as pastureland. Removal of the site from timber production and pasture should have no adverse impacts on the site as timber harvest is still thirty years in the future and the small acreage to be removed would not affect the total harvest of the area. The small acreage devoted to pasture will presently support only a couple of head of livestock during the spring and early summer.

C. State the historical and current agricultural uses which occur adjacent to the site.

Historically the entire area was devoted to agriculture. Presently with the exception of land to the east which is used for agricultural purposes, the rest of the area is being used for residential purposes on large lots approximately five (5) acres in size.

D. Explain any steps which will be taken to avoid or limit development conflicts with adjacent agricultural uses.

The proposed type of development should not affect the surrounding agricultural activities as the immediately surrounding area is already predominately residential in character. The entire perimeter of the proposed campground will be fenced and trees will be provided as buffering.

E. If the site is timbered, state any timber management recommendations which may have been suggested or implemented by the U.S.D.A. Division of Forestry in the area of this proposal.

None proposed.

VI. HISTORICAL, ARCHEOLOGICAL, OR CULTURAL FEATURES

A. Locate on a copy of the preliminary plat any known or possible historical, archeological, or cultural sites which exist on or near the site.

No archaeological or cultural sites are known to exist either on the site or in close proximity.

B. Describe the sites delineated on the preliminary plat.

Not applicable.

C. Describe any measures that will be taken to protect such sites or properties.

Should evidence surface of any archaeological or cultural artifacts during clearing or construction on the site, appropriate agencies will be notified.

VII. SEWAGE TREATMENT

A. Where individual sewage treatment systems are proposed for each parcel.

1. Indicate the distance to the nearest public or community sewage treatment system.

2. Provide as attachments:

a. Two copies of the plat which show the proposed suitable location on each lot for a subsurface treatment system and a 100% replacement area for the subsurface treatment system. Show the location of neighboring wells and subsurface treatment systems and the distances to each.

b. The results of percolation tests performed in representative areas suitable for drainfields in accordance with the most recent DHES Bulletin. Each percolation test shall be keyed by a number on a copy of the plat with the information and results provided in the report. The number of preliminary percolation tests required shall be one-fourth (1/4) of the total number of proposed lots and these tests shall be performed in the different soil types, or evenly spaced throughout the subdivision in the absence of soil variability.

c. A detailed soil description for the area shall be obtained from test holes at least seven (7) feet in depth. The number of test holes will depend upon the variability of the soils. The U.S. Department of Agriculture's "Soils Classification System" shall be used in the descriptions. Information on the internal and surface drainage characteristics shall be included. Each test hold shall be keyed by a number on a copy of the plat with the information provided in the report.

d. A description of the following physical conditions:

(1) Depth to groundwater at time of year when water table is nearest the surface and how this information was obtained.

(2) Minimum depth to bedrock or other impervious material, and how this information was obtained.

B. For a proposed public or community sewage treatment system:

1. Estimate the average number of gallons of sewage generated per day by the development when fully developed.

Preliminary estimates of the daily volume of sewage, using EPA guidelines, would set the amount at five to six thousand gallons per day when the campground is at 100% occupancy. Several conservation methods are being studied to cut this amount to around 4000 GPD. The two methods that will have the highest impact are "gang showers" (time-push-button) and low volume water closets.

2. Where an existing system is to be used:

a. Identify the system and the person, firm, or agency responsible for its operation and maintenance.

b. Indicate the system's capacity to handle additional use and its distance from the development.

c. Provide evidence that permission to connect has been granted.

The above sections are not applicable as a new system is being proposed.

3. Where a new system is proposed.

a. Attach a copy of the plat showing the location of all collection lines and the location and identification of the basic component parts of the treatment system.

b. If subsurface treatment of the effluent is proposed, give the results of the preliminary analysis and percolation tests in the area of the treatment site.

The proposed sewage treatment will provide primary treatment through septic tanks and subsurface injection in a large pressurized drainfield. Eight-tenths of an acre has been designated and is shown on the preliminary plat as the drainfield area. This area includes the replacement area.

Soils logs and percolation tests performed by Environmental Consulting of Kalispell and attached as Exhibit A indicate that an application rate of 0.6 to 0.8 gallon per day per square foot of drainfield trench would be an acceptable rate of application.

c. Provide a description of the following physical conditions:

(1) Depth to groundwater at time of year when table is nearest the surface and how this information was obtained.

Based on seven different test holes excavated in month, depth to groundwater at the time of year when water table is nearest the surface if 8 feet. The attached soils report by Environmental Consultants confirms this. (Exhibit A)

(2) Minimum depth to bedrock or other impervious material, and how this information was obtained.

Minimum depth to bedrock or other impervious materials is 5 feet. Refer to attached soils report by Environmental Consultants. (Exhibit A)

d. Indicate who will bear the costs of installation and who will own, operate, and maintain the system. Also, indicate the anticipated date of completion.

The owner/developers will bear the financial burden of installing and maintaining the system. The anticipated date of completion is month, year.

VIII. WATER SUPPLY

A. Where an individual water supply system is proposed for each parcel:

1. If individually drilled wells are to be used, provide evidence as to adequate quantity and quality of the water supply.

2. If any other method of individual water supply is to be used:

   a. Explain why the alternate form of water supply is proposed instead of drilled wells.

   b. Identify the source of water supply and provide evidence that it is of sufficient quantity and quality to serve the development.

3. Attach two copies of the plat showing the proposed location of each spring, well, cistern, or other water source and indicate the distance to existing or proposed sewage treatment systems.

   The above section is not applicable as individual wells are not proposed for each parcel.

B. Where a public or community water system is proposed:

1. Estimate the number of gallons per day required by the development (including irrigation, if applicable).

   The proposed water system will consist of a well, pressure/storage building and distribution system. The estimated quantity of water required, using conservation methods previously discussed, is 4000 gallons per day. Many of the details of this system can be determined only after the well is completed. It is then that the storage facilities can be sized. These water system plans will also require approval from the State Department of Health, Water Quality Bureau.

2. Where an existing system is to be used:

   a. Identify the system and the person, firm, or agency responsible for its operation and maintenance.

   b. Indicate the system's capacity to handle additional use and its distance from the development.

   c. Provide evidence that permission to connect has been granted.

      The above section is not applicable as a new system is proposed.

3. Where a new system is to be used:

   a. Provide evidence that the water supply is adequate in quantity, quality, and dependability.

      Attached, Exhibit B, is a list of wells that are recorded at the Department of Natural Resources Water Rights Division. Those in Section 17 have been highlighted. The well recorded as Water Right #G7ELJ W143873-00 is approximately 1/4 mile from this site and is of a capacity similar to the well desired at this site. It would appear that a well of sufficient quantity and quality is attainable.

   b. Indicate who will bear the costs of installation, when it will be completed and who will own, operate and maintain the system.

      The owner/developers will install, own, operate, and maintain the system.

   c. Attach a copy of the plat showing the proposed location of the water source and all distribution lines.

      See attached plat.

IX. SOLID WASTE

A. Describe the proposed method of collecting and disposing of solid waste from the development.

   Solid waste will be collected by containers located throughout the campground. The owner may elect to load and haul this solid waste to the Big Sky County Landfill or may elect to contract with the local private hauler, Western Haulers.

B. If central collection areas are proposed within the subdivision, show their location on a copy of the preliminary plat.

   See attached plat.

C. If use of an existing collection system or disposal facility is proposed, indicate the name and location of the facility.

   Refer to section IX A of this Environmental Assessment. The County Landfill is approximately 8 miles from the site.

X. DRAINAGE

A. Streets and Roads.

1. Describe any proposed measures for disposing of storm runoff from streets and roads.

   Due to the green areas to be provided on the perimeters of the campground and the graveled road and graveled parking surfaces, the anticipated increase in storm water runoff will be kept to a minimum. The buffer area around the site should absorb most of the storm water within the confines of the site. Only a small amount will exit the site. The estimations and the direction of flow are shown on the Preliminary Plat supplement. Proposed drainage structures are also shown on this supplement.

2. Indicate the type of road surface proposed.

   The road surface will be graveled.

3. Describe any proposed facilities for stream or drainage crossing (i.e., culverts, bridges).

   Not applicable.

B. Other Areas

1. Describe how surface runoff will be drained or channelled from lots or common areas.

   See section X A of this Environmental Assessment.

2. Indicate if storm runoff will enter surface waters and describe any proposed treatment measures.

   The nearest surface water is the Monroe River, one-half mile west of the site. Storm runoff from this development is not expected to enter the River.

3. Describe any proposed sedimentation and erosion controls to be utilized both during, and after, construction.

   None proposed. See section X A of this Environmental Assessment.

4. Attach a copy of the plat showing how drainage on lots, roads and

other areas will be handled (include sizes and dimensions of ditches, culverts, etc.).

See attached plat.

XI. ROADS

A. Estimate how much daily traffic the development, when fully developed, will generate on existing or proposed roads providing access to the development.

Based on four vehicle trips per day per camp space the average daily traffic (ADT) should not increase by more than 280 vehicles per day.

1. Discuss the capability of existing and proposed roads to safely accommodate this increased traffic (e.g., conditions of the road, surface, and right-of-way widths, current traffic flows, etc.).

   Waverly road has a 24 foot paved roadway surface and has been designated as an arterial according to the Transportation Element of the Comprehensive Plan. The section of road that may be most impacted will probably be the northern 500 feet. It is anticipated that the traffic will mostly arrive and depart via state Route 40. According to the season the traffic will either turn west or east to intercept either Highway 93 or Highway 2.

2. Describe any increased maintenance problems and costs that will be caused by this increase in volume.

   For the most part, RV's are not considered to have heavy axle loadings and, with the exception of the increased volume of traffic, should not adversely impact the roads or highways.

B. Indicate who will pay the cost of installing and maintaining dedicated and/or private roadway.

The roadway will be private and the owner/developer will be responsible for installing and maintaining the roadway.

C. Describe the soil characteristics, on site, as they relate to road and building construction and measures to be taken to control erosion of ditches, banks, and cuts as a result of proposed construction.

The soils on the site have slight limitations for road and building construction and the site is fairly level, therefore there should be no

problems associated with road building. No measures to control erosion of ditches, banks, and cut areas are proposed.

D. Explain why access was not provided by means of a road within the subdivision if access to any of the individual lots is directly from City, County, State, or Federal roads or highways.

Not applicable.

E. Is year–round access by conventional automobile over legal right–of–ways available to the subdivision and to all lots and common facilities within the subdivision?

Yes.

F. Identify the owners of any private property over which access to the subdivision will be provided.

Not applicable.

XII. EMERGENCY SERVICES

A. Describe the emergency services available to the residents of the proposed subdivision including the number of personnel and number of vehicles and/or type of facilities for:

1. Fire Protection

a. Is the proposed subdivision in an urban or rural fire district? If not, will one be formed or extended?

Fire protection shall be provided by the Big Fork Volunteer Fire Department. The tanker should have sufficient capacity to extinguish any fire that might occur in this campground. The mobility of the camping units should also provide a means of deterring any spread of a fire.

b. In absence of a fire district, what fire protection procedures are planned?

Not applicable.

c. Indicate the type, size, and location of any proposed recharge facilities.

Coordination shall be made with the Big Fork Fire Department to determine if and the size of any tanker refilling points needed. These points if required would be located near the entrance of the campground.

d. If fire hydrants are proposed, indicate water pressure capabilities and the locations of hydrants.

Not applicable.

2. Police Protection.

Police protection will be provided by the Big Sky County Sheriff's Department.

3. Ambulance Service.

Ambulance service will be provided by the Big Fork Volunteer Fire Department.

4. Medical Services.

Medical services are available from the Big Fork Hospital located five (5) miles from the site.

B. Can the needs of the proposed subdivision for each of the above services be met by present personnel and facilities?

Yes.

1. If no, what additional expense would be necessary to make these services adequate?

Not applicable.

2. At whose expense would the necessary improvements be made?

Not applicable.

XIII. SCHOOLS

A. Describe the educational facilities which would serve the subdivision (school facilities, school personnel, bus routes and capacities, etc.).

The proposal is a Recreational Vehicle (RV) Campground and no one,

except the caretakers, who are presently the owners and already residing to the north of the site, will be living there on a permanent basis. Therefore, the campground will not contribute any additional children to the school system.

B. Estimate the number of school children that will be added by the proposed subdivision, and how they will affect existing facilities.

Not applicable.

XIV. ECONOMIC BENEFITS

A. Provide the present assessment classifications and range of the total assessed valuation of all land and structures.

The land is presently classified as timber and agricultural land and the County receives $15.00 per year in taxes.

B. Provide the anticipated assessment classification and range of the total assessed valuation of all structures (at 25% and 90% occupancy – also give estimated year of said occupancy):

After development and reclassification the taxes will increase to $330.00 per year on the land. The addition of the building will add another $550.00 to the taxes. The total increase in tax revenue will be $865.00.

C. Provide anticipated revenue increases per unit, from water, sewer, and solid waste fees.

Not Applicable. The site is in the unincorporated area of the County and will have its own water and sewer system. Solid waste disposal will be owner–hauled or privately contracted.

XV. LAND USE

A. Describe the historical use of the site.

As previously mentioned the land has been used for pasture and some forest production. The removal of such a small amount of land from either of these uses would have an insignificant impact.

B. Describe any comprehensive plan recommendations and other land use regulations on and adjacent to the site. Is zoning proposed? If located near an incorporated city or town, is annexation proposed?

Based on the adopted Comprehensive Plan for Big Sky County, the site is designated Agricultural/Silvicultural (1 unit per 20 acres). No zoning nor annexation is proposed. The site is approximately five (5) miles from the nearest incorporated city of Big Fork.

C. Describe the present uses of lands adjacent to or near the proposed development. Describe how the subdivision will affect access to any adjoining land and/or what measures are proposed to provide access.

Adjacent lands to the east are used for agricultural purposes. The other adjacent properties are low density residential.

D. Describe the basis of the need for the subdivision. How much development of a similar nature is, or is not, available in the area?

This development is considered by many as a needed improvement to the area. With the exception of a few RV parking spots in the City of Big Fork, no facilities exist to serve this apparently growing activity. Refer to correspondence from the Director of the Big Fork Chamber of Commerce which states that there is a proven need for additional RV parking spaces in the area. (Exhibit C)

E. Describe any health or safety hazards on or near the subdivision – mining activity, high voltage lines, gas lines, agricultural and farm activities, etc. Any such conditions should be accurately described and their origin and location identified.

There are overhead high voltage power lines along the southern boundary of the site. The Bonneville Power Administration (BPA) has certain regulations governing development in proximity to high voltage power lines and these regulations will be adhered to.

F. Describe any on–site uses creating a nuisance, such as unpleasant odor, unusual noises, dust, smoke, etc. Any such conditions should be accurately described and their origin and location identified.

When the campground is in use, there will be smoke from campfires. However, westerly winds should disperse the smoke across the agricultural lands to the east at the east at the site, creating little or no inconvenience for surrounding residents.

XVI. PARKS AND RECREATION FACILITIES

A. Describe park and recreation facilities to be provided within the proposed subdivision and other recreational facilities which will serve the subdivision.

The purpose of this development is to provide a campground that will serve the "Socialite Camper" who intentionally chooses to stay at campgrounds that offer conveniences of this type. Since one of the reasons for a park is to provide recreation, this campground can be considered a park. Within the campground will be picnic tables, barbecue pits and playground equipment. The developers are considering renting or loaning other types of equipment which would be kept at the main service building. Approximately one-ninth of the area is proposed to be set aside as "open space" for use of the campers.

B. List other parks and recreation facilities or sites in the area and their approximate distance from the site.

There are four (4) parks varying in size from one-half acre to two acres in the City of Big Fork which is approximately five (5) miles away from the proposed campground. In addition Spruce National Park is approximately 20 miles to the northeast.

C. If cash-in-lieu of parkland is proposed, state the purchase price per acre or current market value (values stated must be no more than 12 months old).

Open space areas amounting to one-ninth of the site will be provided, therefore, no cash-in-lieu of parkland is proposed.

Attachments:

Exhibit A - Soils and Percolation Report
Exhibit B - Recorded Wells in the Area
Exhibit C - Correspondence from Director of Big Fork Chamber of Commerce

APPENDIX H

BASICS OF PROPER SUBDIVISION DESIGN

Proper subdivision design and construction may be the most important result of subdivision regulations. Good subdivision design requires an understanding of basic elements in creating functional, balanced, convenient, safe, pleasant neighborhoods. Achieving a well designed subdivision depends not only on technical knowledge, but also on coordination among the activities of the subdivider, governing body, planning board and other officials.

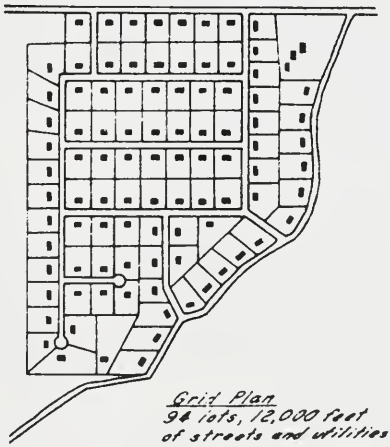
The Montana Subdivision and Platting Act (MSPA) is not intended to give local government the authority to impose design standards that are excessive or unrealistic. Design standards should bear a reasonable relation to the need for protection of public health and safety, and to meet the community's land use and development objectives. It is, however, in the best interest of the community and residents that proper review be provided to achieve the optimal design for each building site. The initial land divisions and the decisions made by the local government regarding those divisions will influence the future character of the community.

Design standards will vary from community to community, but a number of basic design concepts apply virtually everywhere. Local officials should adopt specific standards only after careful study and evaluation to assure that they are tailored to each community and its needs and conditions.

A. BASIC SUBDIVISION DESIGNS

Although an infinite number of variations can be derived, subdivision design can be categorized into three basic concepts: grid, curvilinear, and cluster.

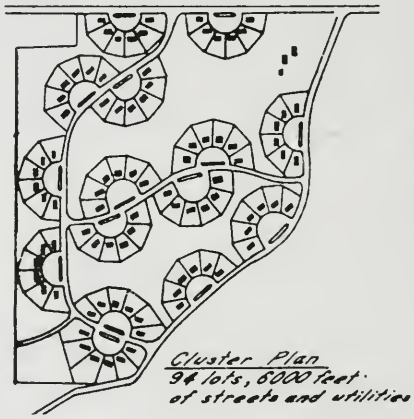
The grid system is a traditional design for subdivisions and townsites in Montana. It uses streets and lots at right angles and forms a grid pattern. The grid system has a number of drawbacks. It requires the greatest length of roads and utilities, creating greater costs for initial construction and maintenance. This system encourages through traffic with the added noise, dust and hazards, and it creates a maximum of hazardous four-way intersections. It is also inappropriate in hilly or steep areas where street and lot layout should complement the terrain to minimize cutting, filling and drainage crossings.



The curvilinear system incorporates curves and bends in the lot and street layout. The layout of lots and streets can be tailored to the natural terrain, reduce the number of drainage crossings, add variety to the development, and serve the same number of lots with fewer miles of roads and utilities.

The cluster, or open space, design organizes smaller lots into groups or clusters. The subdivider can concentrate development in areas where topography, geology and soils are most suitable for building. The less suitable areas can be left in their natural or open state as common area for parks or open space.

The major advantage is that it allows high quality development at minimum cost. The miles of streets and utilities can be greatly reduced, saving both installation and maintenance costs. Greater variety of layout and preservation of natural features and provision of open space are offered by the cluster design.



In reality, good subdivision designs make use of elements of all three basic concepts. In rural areas and in hilly terrain, cluster and curvilinear design can make more efficient use of space, roads and utilities, and can be used to preserve natural features and terrain. In Montana, however, much of the subdivision activity occurs adjacent to, or near, cities and towns and must tie into existing the grid patterns that characterize municipalities.

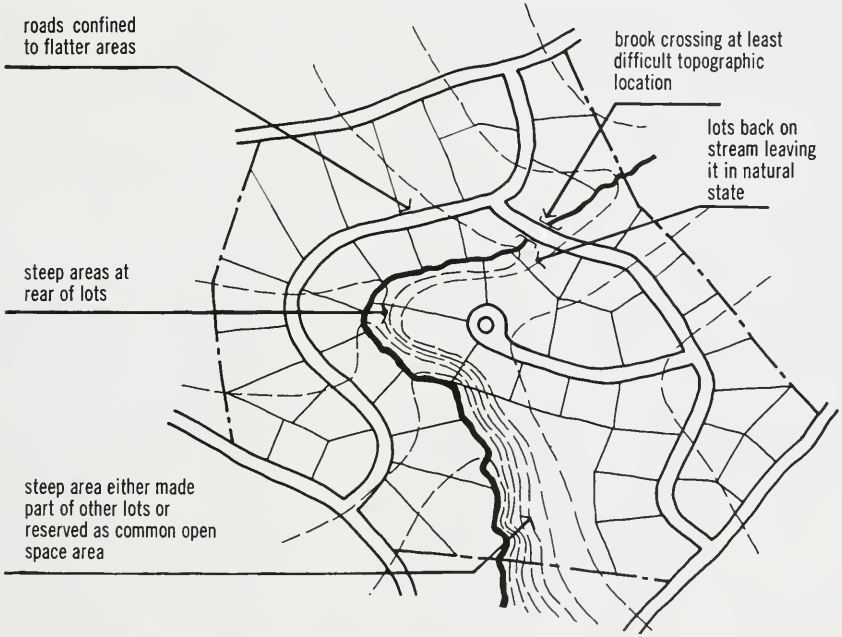
B. PHYSICAL CHARACTERISTICS OF THE SITE

The effect of an area's physical characteristics is an important factor that must be considered in designing and reviewing any subdivision. Soils, geologic conditions, slopes, streams, drainages, and water table all affect the cost of construction and long term maintenance of houses and improvements. In many cases these factors are so important that they determine whether a site is even suitable for development.

Proper subdivision design necessarily begins with a thorough understanding of the natural terrain and features and a commitment to plan and design the development in compatibility with those natural features.

Steep slopes present special problems for development, especially where the slope is composed of unstable or highly erodible soils. To avoid sloughing or slumping, care must be taken not to cut the toe of the slope in constructing roads or homesites.

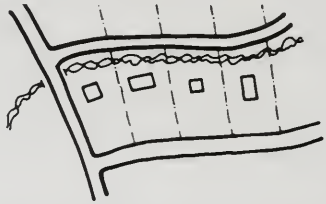
Slopes affect the location of building sites, septic systems and roads. Areas that are more level are preferred locations for building sites because less cutting and filling is needed. Slope also affects the operation of septic systems. To avoid a possibility of septic tank effluent reaching the surface of the ground in steep terrain, health regulations limit the allowable slope that may be used for drainfields, usually to less than 15 percent.


roads confined to flatter areas
brook crossing at least difficult topographic location
lots back on stream leaving it in natural state
steep areas at rear of lots
steep area either made part of other lots or reserved as common open space area

Design and construction of roads is greatly affected by the terrain. In steep terrain, constructing roads diagonally across natural contours minimizes cutting and filling, thus reducing the costs for culverts and dirt moving and minimizes the chances of sloughing. Roads built parallel to the slope have excessive grades and tend to accelerate erosion and create problems with storm runoff.

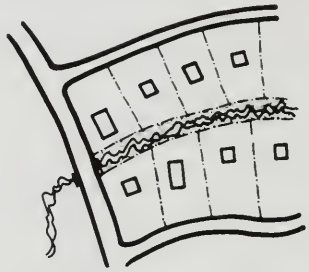
Roads planned to minimize the number of natural drainages that must be crossed require less design work and fill. Where a road crosses a drainage, a culvert of sufficient size is necessary to avoid washing and erosion. Adequate culverts or bridges are necessary where roads cross streams. When inadequate culverts are used, or are improperly installed, erosion and subsequent costly repairs result.

Small streams and natural drainages require special consideration. Where a stream or drainage crosses the middle of a lot, useable space within the lot is greatly reduced. By aligning lot lines along the center of the stream bed or drainage, more desirable and useable lots can be created. An adequate sized building lot can be ensured by enlarging the lot to allow an easement or open space along the stream or drainage.

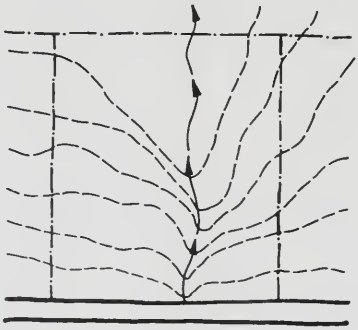


Poor lot layout along stream wastes land and minimizes access.

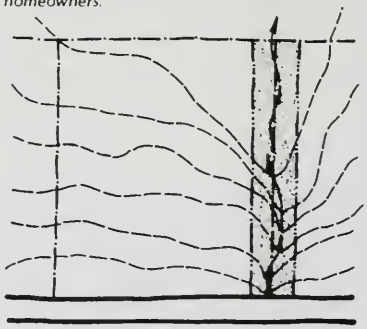
By locating streams along side or rear lot lines the natural stream bank can be preserved, and the lot owners can avoid costly driveway culverts or bridges that are needed when lots front on the stream.



Stream along rear lot line improves access for homeowners.



Poor drainage pattern through the center of a lot.



The drainage pattern is improved by arranging lot lines so that drainage occurs along the lot line.

Areas subject to frequent flooding make poor building sites. Not only is damage from flood waters a concern, but frequently those areas have high water tables, which affect basements or the proper functioning of septic systems. Flood waters are a concern for septic systems because of the possibility for siltation and erosion that can destroy a drainfield. Also, obtaining insurance for buildings located in flood hazard areas can be difficult.

Often, flood hazard areas can be utilized, either for park or open space, or by oversizing lots and allowing the rear yard space to extend into the flood prone area.

Areas which flood should be included in the rear portion of oversize lots, or left as open space.

C. STREET AND LOT LAYOUT

Road systems within a subdivision ideally exhibit five characteristics: (1) the roads allow safe and convenient access to each lot; (2) each road serves a definite function; (3) the roads are located and designed to minimize the impact on the natural terrain; (4) the road layout provides convenient vehicle and pedestrian travel throughout the subdivision; and (5) the road layout is coordinated with the road patterns of the community.

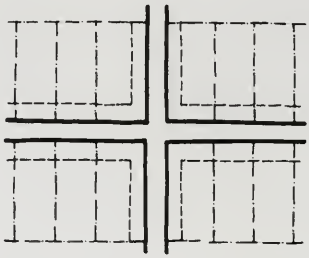
The principal functions of residential roads are to provide access to individual lots, to accommodate their prospective traffic volumes, and to allow safe and convenient entry and travel for emergency vehicles and snow removal and road maintenance equipment.

The function that a street is intended to serve will determine both its right-of-way width and its pavement width. A street serving a high density subdivision may need wider pavement than one which serves a low density residential area. Both greater volumes of traffic and a higher likelihood of on-street parking create the need for a wider road. Collector and arterial streets carry more traffic volume, usually at higher speeds, and must be wider and built with a more substantial base and surfacing.

Right-of-way widths are affected by the need for wider pavement, the need for snow storage areas, sidewalks, utilities, street lights and fire hydrants.

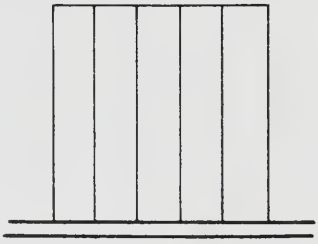
Within any of the three basic subdivision concepts, a number of specific design features are desirable. Lots that are approximately rectangular generally have the most useable space and avoid unusual corners, points or remote areas that cannot be used effectively as part of a building site. Often topography, street layout and the configuration of the original tract dictate that many lots cannot be rectangular. However, in most cases careful design can eliminate most odd-shaped lots with excessive jogs, extreme angles and unusable portions. Lots almost always can be designed to allow side lot lines to be approximately perpendicular to frontage streets.

Corner lots that are larger than interior lots provide an adequate building site even with setbacks on two sides. Through lots – those with street frontage on the front and the rear – are undesirable because of reduced privacy and increased exposure to traffic.

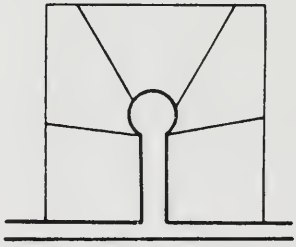


Corner lots should be wider so that distance equal to a front set-back can be allowed between the building and both streets.

Lots whose length does not exceed 3 or 4 times their width usually have a maximum percentage of useable space. When developing an odd shaped tract fronting on an existing road, excessively deep lots can be avoided by designing a cul-de-sac that provides access to more desirably shaped lots.

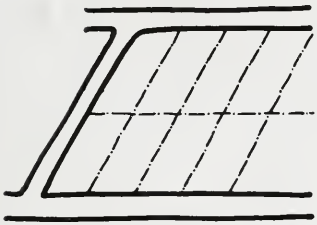


Excessively Deep lots

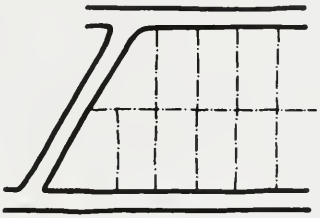


More desirable lots with use of a Cul-de-sac.

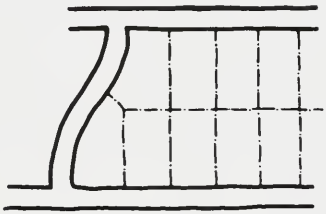
Traffic safety is greatest where the angle of street intersections approximates 90 degrees. Even with curvilinear street design, approximate right angle intersections are possible.



Angled lot lines and intersections should not be allowed.

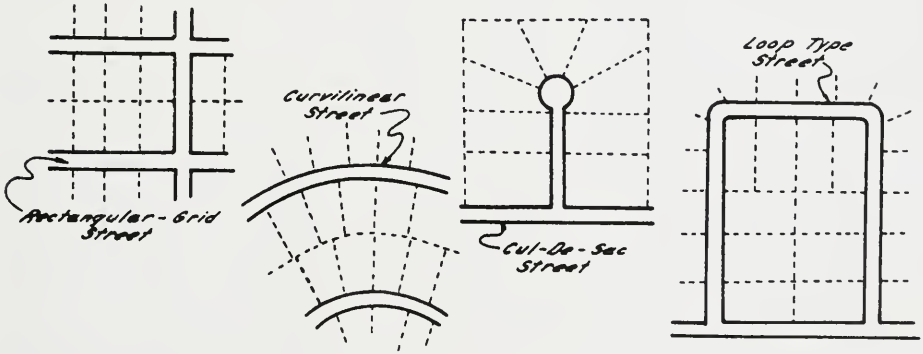


Improved lot layout



Improved lot layout and better intersection design.

Proper road networks can be designed under a variety of lot layouts.



APPENDIX I

AN ANNOTATED BIBLIOGRAPHY AND AUDIOVISUAL LIST ON SUBDIVISION REVIEW

Prepared By:

Robb McCracken, Program Manager
Community Technical Assistance Program
Montana Department of Commerce

Key

MHL = Montana Holding Library (where you can find the book or audiovisual in Montana.)

DOC/CTAP = Montana Department of Commerce, Community Technical Assistance Program Library, Montana, (406) 444-3757.

MSL = Montana State (Government) Library, Helena, Montana, (406) 444-3004.

UM = University of Montana Library, Missoula, Montana. (406) 243-6860.

UM/IMS = University of Montana, Instructional Materials Service, Missoula, Montana (406) 243-4070.

Special Note

The Montana Coal Tax Free Book Loan Service allows any Montanan to borrow any book from any U.S. Library free of charge. Check with your local library for details.

ANALYSIS OF DEVELOPER'S PROPOSALS (FOR GOVERNMENT OFFICIALS)

Stryker, Perrin. How to Judge Environmental Planning for Subdivisions: A Citizen's Guide. (New York: Inform, Inc., No Date) Provides guidance to public officials on what to look for in a developer's subdivision proposal. Useful plat analysis checklist. Of interest to developers who want to design quality subdivisions. MHL: DOC/CTAP, MSL

BIBLIOGRAPHIES ON SUBDIVISIONS

Montana State Library for the Montana Department of Commerce. Land Subdivision Research and Regulations: Montana, (Helena: Montana State Library, May 1985) A brief listing of Montana publications. MHL: DOC/CTAP, MSL

Stewart, Alva W. et. al. Subdivision Regulations: A Land Use Control Tool. (Vance Bibliographies, Architecture Series Bibliography #A1067) (Monticello, Ill: Vance Bibliographies, October 1983) Includes an introduction to subdivision regulations. Bibliographic citations are somewhat dated but still useful. MHL: DOC/CTAP

BUYING LOTS (CONSUMER PROTECTION)

Simko, Patricia A. The Insider's Guide to Owning Land in Subdivisions: How to Buy, Appraise, and Get Rid of Your Lot. (New York: Inform, Inc., 1980) A brief booklet. MHL: DOC/CTAP

Storm S.C. "Diary of a Home Buyer, Looking After You Leap." Montana Environmental Sciences (Vol. #2, 1979) (Helena: Montana Department of Health, 1979) Written in an easy to understand format. Describes how Montana's subdivision laws impact the lot buyer. What to look out for. MHL: DOC/CTAP, MSL

U.S. Department of Housing and Urban Development. Buying Lots From Developers. (Washington: U.S. Government Printing Office, February 1982) A booklet for the lot buyer. Provides guidance on what to look out for. Discusses the Interstate Land Sales Full Disclosure Act. MHL: DOC/CTAP

CLUSTER SUBDIVISIONS

American Planning Association. The Cluster Subdivision: A Cost Effective Approach. (PAS Report #356) (Chicago: APA Planners Advisory Service 1980) Examines regulatory techniques designed to encourage cluster subdivisions. MHL: None known.

COMPUTER SOFTWARE FOR SUBDIVISION PLANNING

Aeronca Electronics, Inc. Aeronca's VGS-300 Plus. (Charlotte, NC: Aeronca Electronics, Inc., 9625 Southern Pine Boulevard, Charlotte, NC, 28210. (704) 523-4808). A micro-based geographic information system that stores and displays subdivision plats. You can visually reroute a subdivision street or lay in a sewer line. MHL: None known.

(The computer field is changing rapidly. Other software packages may be available from other vendors. Check with APA for details.)

CONDOMINIUMS/ TOWNHOUSES

Urban Land Institute. Planning and Design of Townhouses and Condominiums. (Washington: Urban Land Institute, 1980) Overview of the development process for condos and townhouses. MHL: None known.

Urban Land Institute. Time-sharing II. (Washington: Urban Land Institute, 1982) The standard reference on time share developments. MHL: None known.

DEFINITIONS (UNDERSTANDING CONSTRUCTION AND SUBDIVISION JARGON)

Greater Phoenix Chapter, National Association of Women in Construction. Construction Dictionary. (Phoenix: Greater Phoenix Chapter, National Association of Women in Construction, 1982). Contains 14,000 terms and 15,000 definitions. Available from the National Association of Homebuilders. MHL: None known.

Muskowitz, Harvey S. et. al. The Illustrated book of Development Definitions. (Center for Urban Policy Research, 1981) Provides definitions on variety of subdivision terms. Useful for drafting or revising subdivision regulations. Excellent graphics. MHL: MSL

DESIGN OF SUBDIVISIONS (SITE PLANNING)

Dechira, Joseph, et. al. Time-Saver Standards for Site Planning. (McGraw-Hill, 1984) Massive reference book. Covers preliminary site investigations, pre-design data surveys, and sample site designs.

Dechira, Joseph, et. al. Urban Planning and Design Criteria, 3rd Ed. (Van Nostrand Reinhold, 1982) The classic design standard reference book. MHL: MSL

Hendler, Bruce. Caring for the Land, Environmental Principles for Site Design and Review. (PAS Report No. 328) (Chicago: ASPO, June 1977) Tells what to look for in site analysis. Explains how the developer compiles the information. Explains why the information is important. MHL: DOC/CTAP, MSL

National Association of Homebuilders. Community Applications of Density, Design, and Cost. (Videotape - 40 minutes) (Washington: National Association of Homebuilders, 15th and M Streets N.W., Washington, D.C. 20005. (202) 822-0200). Proposes practical solutions to problems of street widths, lot sizes, and setbacks. Existing examples of cost efficient community designs are presented. The moderator is David Jenson, a planning consultant from Denver. MHL: None known.

National Association of Homebuilders. Cost-Effective Site Planning. (Slide Show - 9 minutes) (Washington: National Association of Homebuilders, 15th and M Streets N.W., Washington, D.C. 20005. (202) 822-0200). Highlights planning methods designed to reduce development costs, conserve energy, and enhance the environment. MHL: None known.

National Association of Homebuilders. Making Density Work: Cluster and Zero Lot Line. (Videotapes - two 20 minute tapes) (Washington: National Association of Homebuilders, 15th and M Streets N.W., Washington, D.C. 20005. (202) 822-0200). Presents a wide range of local regulatory issues that contribute to increasing housing costs. The moderator is David Jenson, a planning consultant from Denver. MHL: None known.

Nation Association of Homebuilders. Higher Density: Cost Effective and Affordable.

(Videotape – 15 minutes) (Washington: National Association of Homebuilders, 15th and M Streets N.W., Washington, D.C. 20005. (202) 822–0200). Presents a builder's view of the arguments for increased density. MHL: None known.

National Association of Homebuilders. Residential Site Planning Guide. (Washington: National Association of Homebuilders, 15th and M Streets N.W., Washington, D.C. 20005. (202) 822–0200). General overview of design principles. MHL: None known.

O'Mara, Paul W., et. al. Residential Development Handbook. (Washington: Urban Land Institute, 1978) The standard reference on residential development. MHL: MSL

Rubenstein, Harvey M. A Guide to Site and Environmental Planning, 2nd Ed. (John Wiley and Sons, 1980) Provides design and technical data for site planning and site construction. Includes data on resource analysis, earth work calculation, storm water drainage, soil loss calculation. MHL: None known.

Vogel, Joshua H. Design of Subdivisions. (Seattle: University of Washington, Bureau of Governmental Research and Services, 1965) Profusely illustrated design guidebook. MHL: DOC/CTAP

Walker, Theodore D. Site Design and Construction Detailing, 2nd Edition. (PDA Publishers, 1986) A heavily illustrated source book for site designers. MHL: None known.

ENERGY–EFFICIENT SUBDIVISIONS

Missoula Office of Community Development for the Montana Department of Natural Resources and Conservation (MDNRC). Proposed Energy–Efficient Land Use Regulations For Missoula City and County. (Helena: MDNRC, August 1985). The product of a state funded demonstration project, these regulations were designed to promote energy efficiency in new subdivision developments. The introduction explains key concepts and obstacles to developing effective energy efficient regulations under Montana law. MHL: MSL, DOC/CTAP

ENFORCEMENT OF LOCAL REGULATIONS

Wilcox, Jean E. Preparation of A Successful Land use Case For Regulatory Violations. (Detailed outline, unpublished) (Missoula: Jean E. Wilcox, November 1984) How to deal with regulatory violations. Useful for subdivision administrators and local government attorneys. Written for Montana. MHL: DOC/CTAP

Dorram, Peter. The Expert Witness. (Chicago: APA Planners Press, 1982) How to prepare and present testimony in judicial and quasi–judicial settings. MHL: None known.

EVASION CRITERIA (FOR THE MSPA)

See "Regulations, Subdivision"

EXACTIONS (REQUIRING DEVELOPERS TO PAY FOR COMMON FACILITIES IN SUBDIVISIONS)

Wilcox, Jean E. Development Exactions. (Unpublished Outline) (Missoula: Jean E. Wilcox, May 1985) New developments require the construction of public works -- roads, streets, sewer. Exactions require the subdivider to install the appropriate facilities. The subdivider passes the costs to the new lot owners. The outline provides a theoretical and legal overview of exactions. Provides guidance on when an exaction becomes an unconstitutional "taking". MHL: DOC/CTAP

FEES FOR GOVERNMENT REVIEW OF SUBDIVISIONS

American Planning Association. Setting Zoning and Subdivision Fees: Making Ends Meet. (PAS Report #357) (Chicago: APA Planner's Advisory Service, 1981) How to set fees for subdivision review. MHL: None known.

FILING (RECORDING) PLATS AND OTHER DOCUMENTS

Montana Department of Commerce. A Key to the Filing Requirements of the Montana Subdivision and Platting Act and the Montana Sanitation in Subdivisions Act. Draft. (Unpublished) (Helena: Montana Department of Commerce, 1994) A handbook designed for County Clerk and Recorders and planners. Provides information on how to check subdivision plats, survey documents, and deeds for legal propriety. Designed to help prevent costly filing errors. MHL: DOC/CTAP, MSL

FINANCING OF SUBDIVISIONS FOR DEVELOPERS

U.S. Department of Housing and Urban Development. Administration for Title X Land Development Projects. (HUD Handbook 4800.1) (Washington: HUD, October 27, 1983) Describes the HUD "Title X Mortgage Insurance for Land Development" program. The program provides loan guarantees to developers of subdivisions. Copies are available from : HUD Regional Office, Executive Tower Building, 1405 Curtis Street, Denver, Colorado 80202. MHL: DOC/CTAP

FIRE SAFETY IN SUBDIVISIONS

Colorado State Forest Service. Wildfire Hazards: Guidelines For Their Prevention in Subdivisions and Developments. (Fort Collins, Colorado State University, 1977) A brief description of how to design subdivisions in order to minimize fire danger. MHL: DOC/CTAP

Richard, Jim E. Reducing Fire Damage In Forest Subdivisions Through Land Use Planning, Draft. (Helena: Department of Community Affairs, 1978) Fairly detailed overview of design standards intended to reduce wildfire hazards in new subdivisions. MHL: DOC/CTAP

South Dakota Department of Game, Fish, Parks – Forestry Division. Recommended Guidelines for Subdivisions and Developments. (Pierre: SDDGFP Forestry Division, 1974) Brief overview of design standards for subdivisions to promote fire safety. MHL: DOC/CTAP

U.S. Forest Service. Impact: Fire Prevention in Forest Subdivisions and Developments. Film #SFD 145.3) Available from: University of Montana, Instructional Materials Service, USFS Northern region and MCH Film Libraries, Missoula, Montana 59812. How to reduce fire hazards in subdivisions built in forest area. MHL: UM/IMS

FISCAL IMPACT ANALYSIS

Burchell, Robert W. The New Practitioner's Guide to Fiscal Impact Analysis. (Center for Urban Policy Research, 1985) The new edition of the standard handbook on fiscal impact analysis. MHL: None known.

Kaufman, Nicholas P. Fiscal Impact Analysis for New Single Family Development in Plains, Montana. (Masters Professional Paper) (Missoula: University of Montana, 1984) Fiscal impact analysis applied to subdivisions in Plains, Montana. Comprehensive and well written. MHL: DOC/CTAP, MSL, UM

GENERAL OVERVIEW (OF SUBDIVISION ISSUES AND PROCEDURES)

Minnesota State Planning Agency. Dividing the Land. (Slide Show –19 minutes) (St. Paul: Minnesota State Planning Agency, Training Officer, 550 Cedar Street, St. Paul, MN 55101 – Date Unknown) Excellent overview of subdivision regulations. Shows typical problems that arise without regulation. Reviews the basic principles of subdivision control. Supporting written materials available. MHL: None known.

Montana Department of Commerce. A Primer: Subdivision Review in Montana. (Helena: Montana Department of Commerce, April 1986) An overview of the subdivision review process. Targeted for the layperson. Explains reasons for subdivision review and the history of the Montana Subdivision and Platting Act.

Montana Department of Intergovernmental Relations. Montana Subdivision Handbook. (Helena: Montana Department of Intergovernmental Relations, February 1975) A fairly detailed overview of the subdivision process. Stresses proper site design. MHL: DOC/CTAP, MSL

Montana Department of Intergovernmental Relations. Subdivisions. (Helena: Montana Department of Intergovernmental Relations, July 1974) An overview of Montana Subdivision issues. Provides a local community perspective. MHL: DOC/CTAP

Rural Technical Assistance Program. Subdivisions, A Local Dilemma. (Videotape 30 minutes). (Bozeman: Rural Technical Assistance Program, Montana State University, College of Engineering, 1985) An overview of Montana subdivision issues. Provides a local community perspective. MHL: DOC/CTAP

Technical Planning Associates for the Office of State Planning, State of New Hampshire. Handbook of Subdivision Practice. (Concord: State of New Hampshire, January 1972). A 143 page book on the basics of land subdivision development. Good chapters on site survey and subdivision design. MHL: DOC/CTAP

Yearwood, Richard M. Land Subdivision Regulation, Policy and Legal Considerations for Urban Planning. (New York: Praeger, 1971) The classic handbook on land subdivisions from A to Z. Good explanation of why regulations are necessary. Written for the layperson. MHL: DOC/CTAP

HOMEOWNERS ASSOCIATIONS

Community Associations Institute and the Urban Land Institute. Condominium and Homeowners Associations That Work. (Washington: Urban Land Institute, 1985) Reviews the process of setting up an association. Includes sample legal documents, and outline of the association's decision making process, fiduciary roles, and legal agreements.

Dowden C. James. Community Associations: A Guide for Public Officials. (Washington: Urban Land Institute, 1980) Analyzes community associations. Provides specific advice for condo, PUD, and cluster projects.

IMPROVEMENT GUARANTEES

American Planning Association. Subdivision Improvement Guarantees. (PAS Report No. 298) (Chicago: APA Planner's Advisory Service, 1974) An introduction to guarantee methods. Dated but still useful. MHL: DOC/CTAP

Rogal, Brian. Subdivision Improvement Guarantees. ASPO Planners Advisory Service Report No. 298. (Chicago: American Society of Planning Officials, 1974) Brief overview. Discusses rationale for guarantees. Explains pros and cons of surety performance bonds,

escrow account, property escrow, sequential approval, special assessment, and letter of credit, Sample forms. MHL: DOC/CTAP

Schultz, Michael M. and Kelley, Richard. A Model Subdivision Improvement Agreement and Guarantee: Beyond Empty Promises and Broken Hearts. (Unpublished). Copies available from: Sherman and Howard, Suite 700, Stanford Place 3, 4582 S. Ulster St. Parkway, Denver, CO 80237. Mr. Schultz, a Colorado land use attorney, has done substantive legal research on improvement agreements. This "Model" includes an explanation for each requirement. Highly recommended. MHL: DOC/CTAP.

LOCAL GOVERNMENT REVIEW – DEVELOPER'S VIEWPOINT

Solnit, Albert. Project Approval, A Developer's Guide to Successful Local Government Review. (Belmont, California: Wadsworth, Inc., 1983) A very comprehensive handbook on how the local government review process works from a developer's viewpoint. Tells how to "steer a project" through the government approval process. Also of interest to government officials. This is the standard reference on this topic. MHL: MSL

MARKET STUDIES FOR SUBDIVISIONS (ECONOMIC FEASIBILITY)

American Institute of Real Estate Appraisers of the National Association of Realtors. Subdivision Analysis. (Chicago: AIREA, 1980) This three volume set discusses how to determine the economic feasibility of developing subdivisions. Used as "workbooks" for an AIREA seminar, these publications are not totally self explanatory. They are useful in outlining the financial feasibility process. MHL: DOC/CTAP

Barrett, G. Vincent, et. al. How to Conduct and Analyze Real Estate Market and Feasibility Studies. (Van Nostrand Reinhold, 1981) Explains how to analyze the demand for a proposed development project. MHL: None known.

MOBILE HOME SUBDIVISIONS

Urban Research and Development Corporation for U.S. Department of Housing and Urban Development. Guidelines For Improving The Mobile Home Living Environment: Individual Sites, Mobile Home Parks and Subdivisions. (U.S.G.P.O. Stock No. 023-000-00459-3). (Washington: HUD, May 1978). Very well written. Excellent design guidebook. Mobile home subdivision topics include: regulations, design standards, cost of subdivision improvements, methods to improve the quality of mobile home subdivisions, MHL: DOC/CTAP

MONTANA SUBDIVISION AND PLATTING ACT (MSPA) -- ANALYSIS OF HOW THE LAW WORKS

Beardslee, Mark. The Subdivision and Platting Act in Practice in Nine Montana Counties. (Master's Professional Paper) (Missoula: University of Montana, 1979). A comprehensive study of how well the MSPA has worked in nine Montana counties. Excellent drawings. MHL: UM

Burden, Lys, for the Montana Environmental Information Center. Missoula County Subdivision Inventory Report. (Helena: Montana Environmental Information Center, October 1980). An analysis of how the MSPA has affected the development of Missoula County. The Montana Environmental Information Center mapped and analyzed all types of land divisions in Missoula County. Discusses community problems, such as wildfire hazards, caused by development of "subdivision" exempt from local government review. MHL: DOC/CTAP

Brey, Ron. Subdivision Without Review: A Local Land Use Problem. (Unpublished) (Missoula: University of Montana, 1983) A planning student's brief review of the major problems with the MSPA. MHL: DOC/CTAP

Herrin, John. Natural Resource Law Legislative Workshop Group: Local Subdivisions. (Unpublished) (Missoula: University of Montana, December 17, 1976) An analysis of the problems of the MSPA. Analyzes the philosophical issues, political problems, and other controversies surrounding the MSPA. MHL: DOC/CTAP

Montana Department of Community Affairs. Land Division in Montana: The Subdivision and Platting Act in Practice. (Helena: Montana Department of Community Affairs, January 1977) An analysis of the MSPA. Examines the extent and character of land division under the MSPA. Discusses problems with certain aspects of the MSPA. Excellent drawings of how the exemptions to the law have been inappropriately used to circumvent local government legal review of land developments. MHL: MSL, DOC/CTAP

Montana Department of Intergovernmental Relations, Division of Planning. Montana Subdivision and Platting Act: An 18-Month Perspective. (Helena: MDIGR, October 1974) The MSPA was enacted in 1973. This report analyzes how well the MSPA met its goals after a year and one-half operation of the law. MHL: MSL, DOC/CTAP

Montana Environmental Quality Council. Montana Environmental Quality Council Annual Report, Eighth Edition and Final Status of Natural Resource Legislation in the 48th Legislature. (Helena: Montana Environmental Quality Council, December 31, 1983) Pages 106-111 ("Subdivisions") discusses Montana subdivision laws and their impact on how Montana's land base is being developed. Includes an excellent summary chart which illustrates how land has been divided (under which type of procedures) for each of Montana's 56 counties. MHL: MSL

Montana Legislative Council for the Montana Legislative Subcommittee on Subdivision Laws. Montana's Subdivision Laws: Problems and Prospects. (Helena: Montana Legislative Council, November 1978) An analysis of the Montana Subdivision and Platting Act and the Montana Sanitation in Subdivisions Act. Reviews history of subdivision laws. Contains a review of subdivision laws from states other than Montana. Makes extensive subdivision laws from states other than Montana. Extensive recommendations on changing Montana's subdivision laws. MHL: MSL, DOC/CTAP

Tomlison, William D. for the Montana Environmental Quality Council. Environmental and Legal Problems of Land Development in Montana. (Helena: Montana Environmental Quality Council, October 25, 1972) An analysis of the MSPA. Good overview of the psychology of developing land under the MSPA. Discusses the problems faced by lot buyers and governments due to the development of "subdivisions" that are exempt from government review. Good discussion of how taxation and subdivision practices are interrelated. MHL: MSL, DOC/CTAP

PARKING

Institute of Transportation Engineers. Parking Generation. (Institute of Transportation Engineers, 1990) A guide to estimating parking requirements. MHL: DOC/CTAP

Urban Land Institute. The Dimensions of Parking. (Washington: Urban Land Institute, 1983) The standard reference on parking standards for subdivisions and other developments. MHL: None known.

PARKS

Richard, Jim E. "Flawed, Everyone Agrees . . . But Montana's Park Dedication Requirement Remains" Montana Community News. (Helena: Montana Department of Community Affairs, Volume 2, No. 7, August 1980) Overview of how the MSPA park requirement works. Discusses problems and possible solutions regarding the park requirement. MHL: None known.

National Recreation and Park Association. Recreation, Park, and Open Space Standards and Guidelines. (National Recreation and Park Association 1983) Provides guidelines on space requirements, location and service radius, "sizing" of parks. MHL: None known.

PUBLIC HEARINGS

Mater, Jean. Public Hearings, Procedures and Strategies: A Guide to Influencing Public Decisions. (Prentice Hall, 1984) The first complete guide to the conduct of public hearings. MHL: None known.

National Association of Homebuilders. Planned Unit Development: A Flexible Concept for Land Use, Shelter, and Community. (Slide Show – 10 minutes) (Washington: National Association of Homebuilders, 15th and M Streets N.W., Washington, D.C. 20005 (202) 822–0200). Presents a clear explanation of PUDs and their many advantages. Features four case examples. MHL: None known.

APPENDIX J

SAMPLE POLICIES; SUGGESTED FINDINGS OF FACT

The following are sample policy statements regarding parks and park funds, and suggestions for preparing a finding of fact and weighing the primary review criteria required as part of the process of determining whether a proposed subdivision should be approved, conditionally approved or denied.

PARKS POLICIES

A. CRITERIA FOR ACCEPTING DEDICATED LAND, CASH-IN-LIEU OF LAND, OR RESERVED PRIVATE LAND

Because cash-in-lieu seldom equals the value of land dedicated for parks, _____ County will give first priority to accepting dedicated parkland rather than cash donations. Cash-in-lieu of parkland will be accepted only in the following situations:

1. Sufficient publicly-owned park and recreation areas exist in the vicinity of the proposed subdivision and can be readily used by the residents;

2. Land can be acquired and developed near the proposed subdivision that is either more preferable as parkland or will enhance or complement an existing park and will serve the residents of the proposed subdivision;

3. No area within the subdivision is suitable for parks or recreation facilities;

4. The dedicated park area would not provide a useable area for recreation and could not be feasibly maintained and operated;

5. A portion of the park requirement is met through dedicated parkland and the remaining park requirement is met by a cash donation that will be used to develop the dedicated park land.

B. DETERMINATION OF CASH TO BE PAID IN LIEU OF PARKLAND

The governing body may determine the fair market value of the unsubdivided unimproved value of the parkland by either (1) using the price paid for the property if purchased within one year of the preliminary plat submittal, or (2) using an appraisal conducted by a qualified appraiser acceptable to the governing body. The cost of the appraisal will be borne by the subdivider.

C. ACCEPTANCE OF DEDICATED PARKLAND

The governing body shall make the final decision on the location, design and size (within the statutory requirement) of parkland dedicated within the subdivision.

1. Location

a. The land to be dedicated shall be located:
- To conveniently serve all residents throughout the subdivision, or to complement existing park facilities;
- To allow easy access by vehicle, bicyclists and pedestrians;

b. Parkland may be located and designed to protect, enhance or provide public access to areas with unique natural, wildlife, scenic, aquatic or historic features in or near the proposed subdivision.

2. Size

The park must be of a size usable for recreation and economical for maintenance and operation (e.g., minimum sizes of 1/2 acre within municipalities, and 2 acres in unincorporated areas).

3. Terrain and Natural Features

a. The park land shall not contain marshy, excessively steep or other unsuitable land, and it shall not be excessively costly to develop for the desired recreation purposes.

b. To be usable for recreation purposes the dedicated parkland shall have an average gradient of less than 10 percent or contain terrain features that serve recreation purposes.

c. Use of floodplain areas for park and recreation areas is encouraged, provided the land is suitable and can be developed easily for recreation functions.

4. Development

The parkland should be designed and developed to serve the expected residents of the subdivision or the surrounding area (e.g., elderly, children, and teenagers).

D. USE OF PARK FUNDS

1. Expenditure of park funds for parkland acquisition will be given priority in densely populated locations where there is less than an average of 4,000 square feet (.11 acre)

of parkland per dwelling unit. First consideration in acquiring parkland shall be given to providing adequate parkland in the vicinity of those subdivisions that contributed cash in lieu of parkland.

2. Where development patterns indicate potential areas, county parkland should be acquired at the earliest possible date. Parkland acquisition should be directed toward meeting the needs for additional park and recreation areas.

3. Lands should be purchased to complement or enhance existing or planned parks.

4. Where undeveloped county parkland will meet identified park and recreation needs, park funds may be used for the initial development of that land.

E. RESERVATION OF PRIVATE PARKLAND

1. The county will waive park dedication and cash requirements where a subdivider reserves private land for parks pursuant to Section 76-3-607(3)(b) MCA, provided the parkland complies with all the policies for a dedicated public park set forth in this policy statement.

2. The required property owners' association must ensure retention of the parkland in perpetuity (not applicable in a subdivision created by rent or lease). Association by-laws may not allow future disposal or conversion of parkland.

3. The subdivider must ensure that the parkland will be properly maintained at no expense to the governing body.

The following information shall form the basis of findings of fact and a weighing of the review criteria as part of the determination whether to approve, conditionally approve or deny a proposed subdivision.

A. INFORMATION FOR A FINDING OF FACT

1. Effects on Agriculture

a. The number of acres that would be removed from the production of crops or livestock.

b. Removal from production of agricultural lands that are critical to the area's economy or agricultural operations (e.g., key irrigated lands, wintering pastures or hay lands that would limit the overall livestock production; removing production of a cash crop that is significant to the area economy).

c. The productivity of the land (e.g., Soil Conservation Service soil classifications; number of acres per animal unit month). The number of acres, if any, that are under irrigation.

d. Whether the property is part of an economically viable farm or ranch unit. Whether the property is adjacent to existing suburban development.

e. Conflicts between the proposed subdivision and adjacent farm or ranch operations:

- interference with irrigation systems and facilities,
- diminishing availability or quality of water for irrigation or stock watering,
- interference with movement of livestock,farm machinery,
- maintenance of fences,
- proliferation of weeds,and
- increased vandalism or theft.

f. Potential for residents of the subdivision generating complaints or lawsuits over dust, odor, noise, straying livestock or pesticide and fertilizer application.

g. Effect of the subdivision on the value of nearby agricultural lands:

- market, mortgage, or loan value,
- increased market value accelerate further land division,
- net effect on agricultural taxes resulting from additional services and tax revenues generated by subdivision.

2. Effects on Local Services

a. Increased:
   - hook-ups to water and sewer systems;
   - solid waste collections or use of land fill;
   - traffic volumes on public streets or roads;
   - number of students in elementary and high school;

b. Need to expand or extend public facilities:
   - water or sewer treatment plants, lift stations, mains or trunk lines;
   - extension, widening or improvement of public streets or roads; need for approaches onto public roads;
   - public land fill or solid waste collection sites;
   - expanded school facilities;

c. Need for additional operation and maintenance:
   - water and sewer repair and service;
   - road and street plowing and maintenance;
   - additional solid waste collection, landfill operation needs and costs;
   - additional teachers or other personnel and equipment.

d. Tax classification, and taxable valuation of property prior to subdivision.

e. Expected tax classification and taxable valuation of property after full development.

f. Tax revenues generated prior to subdivision, and expected tax revenues after full development at existing mill levies:
   - to the county;
   - to the municipality;
   - to the elementary school district;
   - to the high school district;
   - to special taxing jurisdictions (e.g., rural fire district).

g. Any special or rural improvement districts that would obligate local government involvement fiscally or administratively.

3. Effects on the Natural Environment

a. Expected alteration of any stream banks or lake or reservoir shorelines; draining, filling or alteration of any wetlands;

b. Expected contamination of any surface or ground water as a result of stormwater runoff, sedimentation, sewage treatment systems, concentration of pesticides or fertilizers;

c. Needed cuts and fills on slopes as result of road or building construction.

d. Significant removal of vegetation; potential soil erosion or bank or slope instability.

e. Presence of natural hazards such as flooding, rock,snow or land slides, high winds, wildfire, or difficulties such as shallow bedrock, high water table, unstable or expansive soils, or excessive slopes.

4. Effects on Wildlife and Wildlife Habitat

a. Location of subdivision and access roads with respect to critical wildlife areas such as big game wintering range, calving areas, migration routes, nesting areas, wetlands, or habitat for endangered or threatened species.

b. Potential for closure of existing access to hunting or fishing areas; potential for providing additional access not currently available.

c. Expected closure of existing access to public lands.

d. Expected effects of pets and human activity on wildlife.

5. Effects on Public Health and Safety

a. Potential hazards to residents of subdivision from high voltage lines, high pressure gas lines, airports, highways, railroads or railroad crossings, nearby industrial or mining activity.

b. Potential for residents of subdivision to file nuisance lawsuits against existing feedlots, processing plants, airports, industrial firms.

c. Creation of public health or safety hazards by subdivision, such as traffic or fire conditions, contamination or depletion of water supplies, accelerated storm runoff, widening of existing floodplain or flood hazard area.

B. WEIGHING THE CRITERIA

After preparing the finding of facts surrounding each of the criteria, the criteria must be weighed as part of forming a determination of whether the subdivision should be approved, conditionally approved or denied. The weighing involves examining all criteria and estimating the expected results a subdivision would have.

Certain results may be positive, supporting a finding that the proposed subdivision could be approved or conditionally approved. Other features may have adverse impacts that would support a finding that a subdivision should be denied or that the adverse impacts be ameliorated with conditions under conditional approval.

1. Positive results could include:

- Affordable housing for low and moderate income families would be provided,
- The value of agricultural land would be increased for agricultural loans and other financing,
- The subdivision would allow realization of economies in scale for development and provision of public services,
- The subdivision is carefully planned to maintain and protect productive agricultural land, wildlife habitat, or natural features such as native vegetation, streams and lakes.

2. Adverse impacts could include:

- The location of the subdivision would require extension of existing public roads at public expense,
- The subdivision would interfere with, or degrade, the utility or value of public parks and recreation facilities,
- The subdivision would interfere with the operation, or potential expansion of landfills, sewage or water treatment plants, or other public facilities,
- The subdivision would interfere with the operation, or potential expansion, of existing feedlots, industrial, processing or commercial uses or mining and forestry operations,
- The subdivision would interfere with agricultural operations: domestic or livestock water supplies; irrigation water or facilities; moving of livestock or machinery,

- The subdivision would remove from production key agricultural lands of economic significance – livestock winter range, hay land, irrigated lands, crops of significant importance to the local or area economy,

- The subdivision would generate further land division in the vicinity that would adversely impact agricultural production, critical wildlife habitat, or the cost of services to units of local government,

- The subdivision would block public access to public lands,

- The subdivision would block existing public access to streams.

The following are example statements that could be used to prepare the required Findings of Fact that addresses the various elements of approval under 76-3-608, MCA. In many cases optional statements (e.g., 1a. or 1b.) are suggested to deal with different circumstances. Local officials will need to draft individual statements that address the particular circumstances of each proposed subdivision.

Local jurisdictions that have adopted comprehensive plans are authorized under Sections 76-3-604(1), and 76-1-606, MCA, to require proposed subdivision plats to conform to the comprehensive plan. Where a local government has adopted a resolution or ordinance requiring subdivision plats to conform to the comprehensive plan, the Findings of Fact should include a statement regarding conformance or non-conformance.

I. PRIMARY REVIEW CRITERIA

Effect on Agriculture

1a. The subdivision will remove _____ acres from (livestock production) (crop production).

or

1b. The subdivision will have no effect on agricultural production because there is no present commercial raising of livestock or crops.

2a. The subdivision will not interfere with any irrigation system or present any interference with agricultural operations in the vicinity.

or

2b. The subdivision could interfere with an existing irrigation system. Conditions of approval should require fencing and restrictive covenants.

Effect on Local Services

1a. The subdivision will connect to the municipal water and sewer systems. The cost of connecting will be paid by the subdivider or lot buyers, and the municipality should not experience an appreciable increase in maintenance and operating costs. The lot buyers will pay regular water and sewer charges.

or

1b. The subdivision will use on-site water supply and sewage disposal.

2a. The subdivision will receive law enforcement services from the (city police

Department. Providing these services to the subdivision is expected to be a negligible cost to the city (county) and fire department. Any increased costs likely will be covered by increased tax revenues from improved properties.

or

2b. Providing these services to the subdivision is expected to create $_____ in additional costs to the local government.

3a. No extension of public streets or roads will be needed, and the subdivision will have a negligible impact on costs of road maintenance.

or

3b. An upgrade of _____ Street will be necessary to serve the subdivision, at an estimated cost of $_____. Annual road maintenance is expected to cost $_____.

4. The land affected by the proposed subdivision currently pays an estimated $_____ in local property taxes. After subdivision, the land and improvements are expected to pay approximately $_____ in local property taxes, at current mill levies.

Effect on the Natural Environment

1. The subdivision will use proper-sized culverts as part of constructing a private access road from the (_____ Road) (_____Street), which will minimize problems of road drainage and erosion.

2a. The relatively level terrain is not expected to create significant surface run-off problems.

or

2b. The steep terrain will require considerable cutting and filling, both for road construction and for grading and leveling a building site. Some surface run-off likely will occur but the grading and drainage plan is designed to prevent significant adverse impacts.

3. The subdivision is not expected to adversely affect native vegetation, soils or the water quality or quantity of surface or ground waters. Areas disturbed by cutting and filling and grading will be reseeded in the same season to minimize erosion.

4. Proposed weed control measures will prevent the proliferation of weed growth within the subdivision and on areas disturbed by construction.

Effect on Wildlife and Wildlife Habitat

1a. The subdivision will not be located in an area of significant wildlife habitat, nor in any critical wildlife areas. The expected effects of pets and human activity generated by the subdivision will not significantly affect wildlife.

or

1b. The subdivision is located in excellent habitat for _____. The subdivision will have an effect on wildlife, and the expected effects of pets and human activity generated by the subdivision could significantly affect wildlife.

or

1c. The subdivision is located adjacent to _____ Creek, which has an excellent fishery. Development of the lots could have an impact on the fishery, but conditions of approval should require all structures to be set back at least 300 feet from the streambank to minimize the impacts.

2a. The subdivision will not result in closure of public access to hunting or fishing areas, nor to public lands.

or

2b. A public trail is included in the plat to provide access to the stream or public lands.

Effect on Public Health and Safety

1a. Based on available information, the subdivision does not appear to be subject to potential natural hazards such as flooding, snow or rock slides, high winds, wildfire or excessive slopes, nor potential man-made hazards such as high voltage power lines, high pressure gas lines, nearby industrial or mining activity, or high traffic volumes.

or

1b. The subdivision is subject to potential hazard from (flooding), (snow or rock slides), (high winds), (wildfire), (excessive slopes), (high voltage power lines), (high pressure gas lines), (nearby industrial or mining activity), or (high traffic volume). The subdivider has committed to minimize the effect of the hazards by:

_____, and

_____.

II. REQUIREMENTS OF MONTANA SUBDIVISION AND PLATTING ACT, UNIFORM STANDARDS FOR MONUMENTATION, AND LOCAL SUBDIVISION REGULATIONS

The subdivision meets the requirements of the Montana Subdivision and Platting Act and conforms to the design standards specified in the local subdivision regulations. The subdivider and the local government have complied with the subdivision review and approval procedures set forth in the local subdivision regulations.

III. EASEMENTS FOR UTILITIES

1a. No easements will be necessary to extend utilities to the subdivision. Utilities are currently adjacent to the property or can be extended within the public road right-of-way.

or

1b. Easements to extend utilities across property(ies) owned by _____, _____ are needed. Utility easements will be granted to the subdivider by those property owners, and the instruments of easement conveyance will be filed with the county clerk and recorder.

VI. LEGAL AND PHYSICAL ACCESS

1a. Legal access will be provided by (_____Road) (_____Street), a public road that is adjacent to the lot(s).

or

1b. Legal access will be provided by a 60-foot wide road easement across properties belonging to _____, _____, and _____. The easements will be surveyed, and instruments of easement conveyance will be filed with the county clerk and recorder.

2a. Physical access will be provided by (_____Road) (_____Street), a public road that is adjacent to the lot(s).

or

2b. Physical access will be provided by a road with a ___-foot wide driving surface constructed in accordance with local road standards from (_____ Road) (_____ Street) to the subdivision.)

3. The following statement will be written on the face of the subdivision plat and on any instruments of conveyance:

a. "Legal and physical access is provided by (_____ Road) (_____ Street), a public road located adjacent to the property."

or

b. "Legal access is provided from (_____ Road) (_____ Street), a public road, by a 60 foot-wide easement across property owned by _____, _____, and _____. Physical access is provided by a road with a ___-foot wide driving surface.")

V. CONFORMANCE TO ADOPTED COMPREHENSIVE PLAN

Local jurisdictions that have adopted a comprehensive plan and have adopted a resolution or ordinance that requires subdivision plats to conform to the comprehensive plan should include a statement similar to one of the following examples.

1a. The subdivision plat conforms to the comprehensive plan adopted by ____(local government)_____.

or

1b. The subdivision plat is not in conformance to the comprehensive plan adopted by ___(local government)_____ for the following reasons:

_____, and

_____.

APPENDIX K

SUBDIVISION REVIEW FEES

The Montana Subdivision and Platting Act allows officials to charge subdividers a review fee to off-set all or part of the public costs of reviewing subdivision proposals. All local jurisdictions face the question of determining appropriate review fees.

The review fees charged by most local governments falls short of covering the actual local government costs for holding public hearings, conducting on-site inspections, meeting with the subdivider and his contractors and reviewing the preliminary plat, environmental assessment and other information. In the instances where local governments try to set the review fees to cover the actual costs of review, political pressure often mounts against the higher fees. Thus, in nearly all local jurisdictions the cost to local subdivision review is borne in part by the general taxpayer.

However, it can be argued that the general public should bear a portion of the costs of review. While subdivision review and approval greatly benefits the subdivider, the general public certainly benefits from properly designed and constructed subdivisions. Local officials might consider it appropriate for the public to subsidize a part of the costs of a sound, effective subdivision review program.

The actual costs often can be difficult to determine. The tasks involved in reviewing a subdivision may not be easily separated from the other planning responsibilities a subdivision administrator performs. It is important to note that a significant amount of staff time is spent in reviewing the preliminary plat and materials, meeting with the subdivider and other affected persons, and discussing the proposal with other officials and the governing body. Also, out-of-pocket expenses are incurred in travel to the site, publishing notice, and advertising hearings.

Where local officials take the time to monitor and document the time and expenses involved in subdivision review, everyone is better able to address the issue of distributing the costs of public subdivision review.

The following is a guideline to give local officials a point from which to begin discussing a review fee schedule. It was developed as a result of contacting a number of local planning offices in Montana. This fee schedule does not necessarily cover the actual costs of subdivision review.

1. Preliminary Plat Review

To cover the costs of reviewing proposed plats, plans, environmental assessments, holding public hearings, publishing notice, contacting adjacent landowners, and other expenses associated with the review and approval of a preliminary subdivision plat, the

subdivider shall pay a non–refundable fee at the time of application for preliminary plat approval. The fees, payable to the county (city) treasurer, are as follows:

Number of Lots	Fee
1–5 (minor subdivisions)	$100 + $10 per lot
6 or more	$200 + $10 per lot

2. Final Plat Review

To cover the costs of conducting on–site inspections, executing improvements agreements and securities, and reviewing compliance with conditions and standards the subdivider shall pay a non–refundable fee to the county (city) treasurer as follows:

$75 + $1 per lot

3. Final Plat Filing

Section 7–4–2651, MCA, provides that the following fees be paid by the subdivider to the county clerk and recorder:

$5 + $.50 per lot up to and including 100 lots, plus $.25 per lot for each additional lot in excess of 100, plus $2.00 per page.

APPENDIX L

SUBDIVISION IMPROVEMENTS AGREEMENT; GUARANTEE

MODEL SUBDIVISION IMPROVEMENT AGREEMENT

The parties to this Subdivision Improvements Agreement ("this agreement") are _____("the Developer") and _____("the City" or "the County").

WHEREAS, the Developer also desires to defer construction of improvements described in Attachment A;

WHEREAS, the purpose of this Agreement is to protect the City (or County) and is not intended for the benefit of contractors, suppliers, laborers or others providing work, services, or materials to the Subdivision, or for the benefit of lot or home buyers in the Subdivision; and

WHEREAS, the mutual promises, covenants and obligations contained in this Agreement are authorized by state law and the City (or County) subdivision regulations.

NOW THEREFORE BE IT RESOLVED, The Parties hereby agree as follows:

1. Effective Date: The effective date of this Agreement shall be the date that final subdivision plat approval is granted by the City (or County).

2. Attachments: The Attachments cited herein are hereby made a part of this Agreement.

Developer's Obligations

3. Improvements: The Developer shall construct and install, at his own expense, those subdivision improvements listed in Attachment A of this Agreement. The Developer's obligation to complete the improvements shall arise upon approval of the final subdivision plat, shall not be conditioned on the commencement of construction in the development or sale of any lots or improvements within the subdivision, and shall be independent of any obligations of the City (or County) contained in this Agreement.

4. Security: To secure the performance of his obligations under this Agreement, the Developer shall deposit with the City (or County) on or before the effective date, an Irrevocable Letter of Credit (or other financial security acceptable to the local officials) in the amount of $_____. The letter of credit shall be issued by (lending institution), be payable at sight to the City (or County) and bear an expiration date not sooner than 4 years after the effective date of this Agreement. The letter of credit shall be payable to the City (or County) at any time upon presentation of (1) a sight draft drawn on the

issuing lending institution in the amount up to $_____; (2) a signed statement or affidavit executed by an authorized City (or County) official stating that the Developer is in default under this Agreement; and (3) the original copy of the letter of credit.

5. Standards: The Developer shall construct the required improvements according to the standards and specifications required by the City (or County) as specified in Attachment A of this Agreement.

6. Warranty: The Developer warrants that each and every improvement shall be free from defects for a period of 1 year from the date that the City (or County) accepts the dedication of the last improvement completed by the Developer.

7. Commencement and Completion Periods: The Developer shall complete all of the required improvements within (2) years from the effective date of this Agreement.

8. Compliance with Law: The Developer shall comply with all relevant laws, ordinances, regulations and requirements in effect at the time of subdivision plat approval when meeting his obligations under this Agreement.

City's (or County's) Obligations

9. Inspection and Certification: (A) The City (or County) shall provide for inspection of the improvements as they are completed and, where found acceptable, shall certify those improvements as complying with the standards and specifications set forth in Attachment a of this Agreement. The inspection and certification, shall occur within 14 days of notice by the Developer that the improvements are complete and he desires City (or County) inspection and certification. Before requesting City (or County) certification of any improvement the Developer shall present to the City (or County) valid lien waivers from all persons providing materials or performing work on the improvement. (B) Certification by the City (or County) does not constitute a waiver by the City (or County) of the right to draw funds under the letter of credit in the event defects in or failure of any improvement are found following the certification.

10. Notice of Defect: The City (or County) shall provide timely notice to the Developer whenever inspection reveals that an improvement does not conform to the standards and specifications set forth in Attachment A, or is otherwise defective. The Developer shall have 30 days from the date the notice is issued to remedy the defect. The City (or County) may not declare a default under this Agreement during the 30 day remedy period unless the Developer clearly indicates he does not intend to correct the defect. The Developer shall have no right to correct the defect in, or failure of, any improvement found after the City (or County) accepts dedication of the improvements.

11. Reduction of Security: After the acceptance of any improvement, the amount that the City (or County) is entitled to draw on the letter of credit shall be reduced by an amount equal to 90 percent of the estimated cost of the improvement as shown in

Attachment A. At the request of the Developer, the City (or County) shall execute a certificate verifying the acceptance of the improvement and waiving its right to draw on the letter of credit to the extent of the amount. Upon the certification of all of the improvements the balance that may be drawn under the credit shall be available to the City (or County) for the one year warranty period plus an additional 90 days.

12. Use of Proceeds: The City (or County) shall use funds drawn under the letter of credit only for the purposes of completing the improvements or correcting defects in or failure of the improvements.

Other Provisions

13. Events of Default: The following conditions, occurrences or actions shall constitute a default by the Developer during the completion period:

a. failure to complete construction of the improvements within 2 years of final subdivision plat approval;
b. failure to remedy the defective construction of any improvement within the remedy period;
c. insolvency of the Developer or the filing of a petition for bankruptcy;
d. foreclosure of the property or assignment or conveyance of the property in lieu of foreclosure.

14. Measure of Damages: The measure of damages for breach of this Agreement shall be the reasonable cost of completing the improvements. For purposes of this Agreement the estimated cost of the improvements as specified in Attachment A shall be prima facie evidence of the minimum cost of completion. However, neither that amount nor the amount of the letter of credit establishes the maximum amount of the Developer's liability. The City (or County) shall be entitled to complete all unfinished improvements at the time of default regardless of the extent to which development has taken place in the Subdivision or whether development ever was commenced.

15. Local Government Rights Upon Default: (A) Upon the occurrence of any event of default, the City (or County) may draw on the letter of credit to the extent of the face amount of the credit less the estimated cost (as shown in Attachment A) of all improvements previously certified by the City (or County). The City (or County) shall have the right to complete improvements itself or contract with a third party for completion, or the City (or County) may assign the proceeds of the letter of credit to a subsequent developer who has acquired the Subdivision and who shall have the same rights of completion as the City (or County) if and only if the subsequent developer agrees in writing to complete the unfinished improvements. (B) In addition, the City (or County) may suspend final plat approval during which time the Developer shall have no right to sell, transfer or otherwise convey lots or homes within the Subdivision without the express approval of the City (or County) or until the improvements are completed and certified by the City (or County).

16. Indemnification: The Developer agrees to indemnify and hold the City (or County) harmless for and against all claims, costs and liability of every kind and nature, for injury or damage received or sustained by any person or entity in connection with, or on account of the performance of work under this Agreement. The Developer is not an employee or agent of the City (or County).

17. Amendment or Modification: The Parties to this Agreement may amend or modify this Agreement only by written instrument executed on behalf of the City (or County) and by the Developer.

18. Attorney's Fees: Should either party be required to resort to litigation, arbitration or mediation to enforce the terms of this Agreement, the prevailing party, whether plaintiff or defendant, shall be entitled to costs, including reasonable attorney's fees and expert witness fees, from the opposing party. If the court, arbitrator or mediator awards relief to both parties, each shall bear its own costs in their entirety.

19. Third Party Rights: No person or entity who is not party to this Agreement shall have any right of action under this Agreement, except that if the City (or County) does not exercise its rights within 60 days following an event of default, a purchaser of a lot or home in the Subdivision may bring an action in mandamus to compel the City (or County) to exercise its rights.

20. Scope: The Agreement constitutes the entire agreement between the parties and no statement, promise or inducement that is not contained in this Agreement shall be binding on the parties.

21. Time: For the purpose of computing the commencement and completion periods, and time periods for City (or County) action, times in which war, civil disasters, acts of God or extreme weather conditions occur shall not be included if the events prevent the Developer or the City (or County) from performing the obligations under this Agreement.

22. Assigns: The benefits of this Agreement to the Developer may not be assigned without the express written approval of the City (or County). Such approval may not be withheld unreasonably, but any unapproved assignment is void. There is no prohibition on the right of the City (or County) to assign its rights under this Agreement.

The City (or County) shall release the original Developer's letter of credit if it accepts new security from any developer or lender who obtains the property. However, no action by the City (or County) shall constitute a release of the original developer from his liability under this Agreement.

23. Severability: If any part, term or provision of this Agreement is held by the courts to be illegal, the illegality shall not affect the validity of any other part, term or provision, and the rights of the parties shall be construed as if the part, term or provision were never part of the Agreement.

Dated this ___ day of _____, 19___.

_____
City (or County) Official

_____
Developer

Comment: Attached to this Agreement should be Attachment A, a list of required improvements and their projected costs.

Comments are numbered to correspond with paragraph numbers in the Model Subdivision Improvements Agreement.

The "WHEREAS" section does not form any obligations on either the Developer or the local government but is helpful to establish the facts and circumstances surrounding the agreement and the intention of the parties.

The "WHEREAS" section outlines the fact that the developer wants final plat approval and also wants to defer installation of the required improvements. The improvements agreement clearly expresses that the agreement is to protect the public interest, and is not for the benefit of lot buyers or persons providing services or materials to the subdivision.

3. Improvements: The required improvements and their estimated costs should be clearly specified by line item. It is important to provide that the developer be required to complete improvements even if he does not begin construction in the subdivision. Also, the developer's obligation to install improvements is immediate and does not depend on any further actions by the local government. The local government benefits by ensuring that the improvements will be constructed once the property is platted.

4. Security: Future disagreements can be minimized by specifying the terms of the letter of credit (or other security) in the agreement. A letter of credit is assumed throughout the entire agreement. Other forms of security could be substituted.

6. Warranty. The term of the security should be long enough to include the 1 year warranty period during which the developer is responsible for correcting defects. The warranty period for all improvements extends for one year following the certification of the last completed improvements.

7. Completion Period. The model agreement uses a 2 year period for completion of improvements. Eighteen months is frequently used by Montana local governments. Local officials may want to adjust the completion period to the size and complexity of the subdivision and the required improvements. The local government reduces its risk by using as short a completion period as is practical for the developer. Longer completion periods offer a greater chance that local officials shall lose track of completion deadline, or that complications or other circumstances shall arise to prevent completion of the improvements.

While the model does not suggest a commencement date for beginning construction of improvements, local officials may want to require early commencement of the subdivision. If the developer is unable to begin construction in a timely manner, or abandons construction for a long period of time, it may be a sign that problems exist with financing, marketing or other problems with the subdivision. If a required commencement date is

incorporated, consideration should be given to Montana's potential for severe weather conditions. Also, the commencement date should not be so early as to negate the purpose of deferring the improvements.

8. Compliance with Law. Requiring the developer to comply with all laws and regulations in effect on the date of final plat approval is sound management. However, to comply with Section 76-3-610(2) of the MSPA local officials must not place additional local conditions after preliminary plat approval.

9. Inspection and Certification. The procedures for inspecting and certification that the completed improvements are acceptable are important aspects of subdivision regulation. The local government should faithfully observe its time limits to relieve the lender and the developer of the portion of risk under the letter of credit. By obtaining lien waivers the local government frees the improvements from claims of persons who worked on or provided materials to the improvements. Note: If the improvements ultimately are defective, the certification is not a waiver of the developer's warranty.

10. Notice of Defect. The developer retains responsibility to remedy defects in completed improvements, even after the local government has certified them. The developer is provided a 30 day period to remedy the defect before the local government may declare a default. After the warranty period, the developer has no right or responsibility to correct defects.

11. Reduction of Security. The purpose of the letter of credit is not to impose a penalty on the developer, nor to generate liquidated funds for the local government. As improvements are completed and certified, the local government's risk is proportionately reduced and the developer's exposure under the letter of credit also should be reduced.

12. Use of Proceeds. The agreement is not intended to create a windfall for the local government and it is reasonable that the local government commits to use proceeds only to complete the improvements.

13. Events of Default. Confusion and disagreement can be avoided by identifying the specific conditions or events that shall constitute a default. The Model Subdivision Improvements Agreement specifies that default occurs in more circumstances than the failure to complete the improvements. These circumstances increase the local government's leverage and assist in settling disputes with the developer.

14. Measure of Damage. The estimated costs specified in the subdivision improvements agreement serve as the basis for determining the amount of money the local government receives from the lender. The Model allows the local government to complete all improvements regardless of the extent to which the developer has completed overall development in the subdivision. This helps to ensure that the platted property does not remain unimproved.

The Model is clear that the estimated costs and the amount of the letter of credit do not establish a limit on the government's right of recovery. The lender is not responsible beyond the limits of the letter of credit, but the developer is responsible for the reasonable cost the local government incurs in constructing the defaulted improvements.

15. Local Government Rights Upon Default. The Model ensures that the local government has the authority to assign the proceeds to a third party to complete the improvements or to a subsequent developer that shall complete development of the subdivision.

The model gives the local government the power to suspend final plat approval and prevent further lot sales in the event of default until the improvements are constructed and certified.

16. Indemnification. This provision obligates the developer to reimburse the local government for any out-of-pocket expenses that may result from claims arising from the construction of the improvements.

An express statement that the developer is not an agent of the local government clarifies that the local government is not liable for acts of the developer on grounds that he is an employee or agent of the government.

18. Attorney's Fees. Requiring the unsuccessful party to pay attorney and court costs helps minimize needless litigation by developers.

19. Third Party Rights. The agreement expressly excludes rights of third parties to bring legal actions. It provides, however, for a lot or home buyer to bring a mandamus action to force the local government to exercise its rights in the event of default.

21. Time. This provision protects the developer and the local government from circumstances beyond their control that prevent meeting time deadlines.

22. Assigns. In the event the subdivision is conveyed to another developer, the rights and benefits of the original developer under the improvements agreement can be assigned to the subsequent developer, but only with local government approval. The purpose is to prevent the local government from having to deal with a developer who may not have worthy credit or an acceptable track record. Local officials need not release the original developer from his obligations under the agreement until it is certain that the improvements shall be adequately secured by the new developer.

ACCEPTABLE FORMS OF IMPROVEMENTS GUARANTEES

The following are acceptable means of guaranteeing subdivision improvements agreements, although others may also be acceptable. The irrevocable letter of credit is often the preferable guaranty because it is usually feasible for a subdivider to secure, and the local government can readily obtain funds to complete the required improvements should the subdivider default on installing the improvements. A suggested irrevocable letter of credit and commentary are included as part of this Appendix. The other common guaranties are also explained below.

The subdivider shall provide one or more of the following financial security guarantees in the amount of 100 percent of the estimated total cost of installing all required improvements.

1. Letter of Credit

   Subject to governing body approval, the subdivider shall provide the governing body a letter of credit from a bank or other reputable institution or individual certifying the following:

   a. That the creditor guarantees funds in an amount equal to the cost, as approved by the governing body, of completing all required improvements.
   b. That if the subdivider fails to complete the specified improvements within the required period, the creditor will immediately pay to the governing body upon presentation of a sight draft without further action, an amount of cash necessary to finance the completion of those improvements, up to the limit of credit stated in the letter.
   c. That this letter of credit may not be withdrawn, or reduced in amount, until released by the governing body.

2. Escrow Account

   The subdivider shall deposit cash, or collateral readily convertible to cash at face value, either with the governing body or in escrow with a bank. The use of collateral other than cash, and the selection of the bank where funds are to be deposited must be approved by the governing body.

   Where an escrow account is to be used, the subdivider shall give the governing body an agreement with the bank guaranteeing the following:
   a. That the funds in the escrow account are to be held in trust until released by the governing body and may not be used or pledged by the subdivider as security for any obligation during that period.
   b. That, should the subdivider fail to complete the required improvements, the bank shall immediately make the funds in escrow available to the governing body for completing these improvements.

3. Property Escrow

The subdivider may offer as a guarantee land or other property, including corporate stocks or bonds. The value of any real property to be used, accounting for the possibility of a decline in its value during the guarantee period, shall be established by a licensed real estate appraiser at the subdivider's expense. The governing body may reject the use of property as collateral when the property value is unstable, when the property may be difficult to sell, or when other factors exist which will inhibit the exchange of the property for an amount of money sufficient to complete required improvements.

When property is offered as an improvement guarantee, the subdivider shall:

a. Make an agreement with the escrow agent instructing the agent to release the property to the governing body in the case of default. The agreement shall be placed on file with the county clerk and recorder.
b. File with the governing body an affidavit affirming that the property to be used as a guarantee is free and clear of any encumbrances or liens at the time it is to be put in escrow.
c. Execute and file with the governing body an agreement stating that the property to be placed in escrow as an improvement guarantee will not be used for any other purpose, or pledged as a security for any other matter until it is released by the governing body.

4. Sequential Development

Where a subdivision is to be developed in phased portions, the governing body may, at its discretion, waive the use of a guarantee on the initial portion, provided that the portion contains no more than 25 lots, or 50 percent of the total number of lots in the proposed subdivision, whichever is less. The governing body may grant final plat approval to only one portion at a time. The plat approval for each succeeding portion will be contingent upon completion of all improvements in each preceding portion, and acceptance of those improvements by the governing body. Completion of improvements in the final portion of the subdivision must be guaranteed through the use of one of the other methods detailed in this section.

5. Surety Performance Bond

The bond shall be executed by a surety company authorized to do business in the State of Montana and acceptable as a surety to the governing body and countersigned by a Montana agent. The bond shall be payable to the County (City) of _____. The bond shall be in effect until the completed improvements are accepted by the governing body.

6. Special Improvements District

The governing body may enter into an agreement with the subdivider, and the owners of the property proposed for subdivision if other than the subdivider, that the installation of required improvements will be financed through a special or rural improvement district created pursuant to Title 7, Chapter 12, MCA. This agreement must provide that no lots within the subdivision will be sold, rented, or leased, and no contract for the sale of lots executed, before the improvement district has been created.

If the proposed subdivision lies in an unincorporated area, the subdivider, or other owners of the property involved must also petition the board of county commissioners to create a rural improvement district pursuant to Section 7-12-2102, MCA.

An agreement to finance improvements through the creation of a special improvement district, or a petition to create a rural improvement district, constitutes a waiver by the subdivider or the other owners of the property of the right to protest, or petition against, the creation of the district under either Section 7-12-2109 or Section 7-12-4110, MCA. This waiver must be filed with the county clerk and recorder and will be deemed to run with the land.

Comment: Local officials should be cautious in accepting special improvement districts or rural improvement districts as forms of improvements guaranties. In a number of cases in Montana, the subdivider has been unable to pay the assessments, and the city or county has had to bear the cost of completing the required improvements. These problems occur most frequently where improvement districts are formed as a means to provide improvements on raw land, and local officials may want to avoid creating improvement districts for undeveloped property.

Local officials should consult a bond underwriter before accepting an improvement district as a form of improvements guaranty.

Comment: Letters of credit may be revocable, so it is important to express that the letter of credit is irrevocable. Because the letter of credit does not incorporate the subdivision improvement agreement, the issuer of the credit cannot raise objections to the demand for payment. By requiring the local government to present only a signed statement or affidavit that the developer is in default, the local government need not present proof of default or signed statements from any other party.

Under the letter of credit the local government is committed to use the funds for completion of the improvement.

It is important that the expiration date of the letter of credit gives the local government a reasonable amount of time after the improvements completion deadline to inspect the improvements, and if defects are found to prepare proper drafts and documentation for presentation to the lending institution.

Lending institutions may resist longer periods for their letters of credit to be in force because it extends their risk over a greater length of time. Typically, 18–24 months constitute the completion period, and an additional 1 year warranty period is established to allow the local government to monitor for defects or failures. Following the warranty period an additional 90 days is reasonable to give local officials time to submit any drafts and documentation to draw funds, if necessary.

A "sight draft" commits the payor to make payment at the time the draft is presented, or on sight. Other types of drafts allow a waiting period or approval before the payor must make the payment.

MODEL
IRREVOCABLE LETTER OF CREDIT

Letter of Credit No._____

Name of Local Government Date
Address

Gentlemen:

We hereby establish in your favor our Irrevocable Letter of Credit #____ for the account of (Developer), available by your drafts at sight up to an aggregate amount of $_____. Should (Developer) default or fail to complete the improvements under the terms specified in the attached subdivision improvements agreement for (name of subdivision), we shall pay on demand your sight draft or drafts for such funds, to the limit of credit set forth herein, as are required to complete said improvements.

All drafts must be presented prior to expiration date and this Letter of Credit must accompany the final draft for payment. Drafts drawn hereunder must be by sight draft marked:

> "Drawn under (lending institution), Letter of Credit #_____
> dated (date of Letter of Credit)," and the amount drawn endorsed on the reverse hereof by the lending institution.

Unless otherwise stated, this Letter of Credit is subject to the Uniform Customs and Practices for Commercial Documentary Credits (1983 Revision) International Chamber of Commerce. We hereby agree with the drawers, endorsers and bona fide holders of the drafts drawn under and in compliance with the terms of this Credit that these drafts shall be duly honored upon presentation to the drawee.

This letter of credit may not be withdrawn or reduced in any amount prior to its expiration date except by your draft or written release.

(Lending Institution)

(Signature and Title of Official)

APPENDIX M

SAMPLE FORMS, CHECKLISTS AND CERTIFICATES

Preliminary Subdivision Plat Application Form

Preliminary Plat Review Checklist

Preliminary Plat Form, Contents and Supplements

Final Plat Approval Application Form

Certificate of Completion of Public Improvements

Certificate of Surveyor -- Final Plat

Certificate of Dedication -- Final Plat

Certificate of Consent to Dedication by Encumbrances

Certificate of Waiver of Park Land Dedication and Acceptance of Cash in Lieu

Certificate Stating Facts Authorizing the Governing Body to Waive Park Dedication Under the Five Acre, Single Family Dwelling Exemption

Covenant for Use With the Five Acre, single Family Dwelling Exemption

Certificate of Examining Land Surveyor Where Required -- Final Plat

Certificate of County Treasurer

Certificate of Final Plat Approval -- County

Certificate of Final Plat Approval -- City

Certificate of Filing by Clerk and Recorder

PRELIMINARY SUBDIVISION PLAT APPLICATION FORM

1. Name, address and telephone number of landowner and representative, if any (eg: engineer, surveyor).

2. Name of development, if any _____

3. Location (City or County) _____

   Legal Description: _____

4. Descriptive Data:
   a. Total area in acres _____
   b. Number of lots or rental spaces _____
   c. Minimum and maximum sizes of lots or spaces _____

   Indicate the proposed use(s) and number of lots or spaces in each:

   _____ Residential, single family
   _____ Residential, multiple family
   Types of multiple family structures and numbers of each (e.g.: duplex, four-plex)
   _____ Planned Unit Development (No. of units _____)
   _____ Condominium (No. of units _____)
   _____ Recreational or Second Home
   _____ Mobile Home Park
   _____ Recreation Vehicle Park
   _____ Commercial or Industrial
   _____ Other (please describe)
   _____

5. Physical Conditions:

   Provide the following information regarding the development:
   a. Current land use _____
   b. Existing zoning or other regulations _____
   c. Depth to ground water at time of year when water table is nearest the natural ground surface within the drainfield area _____
   d. Depth to bedrock or other impervious material in the drainfield area_____

6. List of materials submitted with this application:
   a. Copies of preliminary plat
   b. Vicinity sketch
   c. Contour map
   d. _____
   e. _____
   f. _____
   g. _____
   h. _____

I hereby affirm that all the statements and information contained herein and the statements and information contained in all exhibits transmitted herewith are true. I hereby apply to the (governing body) of (city or county) for approval of the preliminary plat for (name of subdivision) Subdivision.

_____
Subdivider or Agent

The DHES/Local Government Joint Subdivision Application Form (Appendix C) may be used in place of this application.

PRELIMINARY PLAT REVIEW CHECKLIST

Name of Subdivision _____

Location _____

_____
(Section, Range, Township, and Quarter–Section)

Name, Address and Telephone Number of Subdivider.

_____

_____

CHECKLIST

		Yes	No
1.	Complete preliminary plat application		
2.	Required number of plats and supplements submitted		
3.	Filing fee paid		
4.	Subdivision name duplicates other		
5.	Correct preliminary plat size		
6.	Preliminary plat contains on the face of the plat or on separate sheets referenced on the face of the plat:		
	a. Title block:		
	(1) Name of subdivision		
	(2) Location		
	(3) Scale		
	(4) North arrow		
	(5) Date of preparation		
	b. The approximate exterior boundaries of the platted tract		

		Yes	No
c.	The approximate location of all section corners or legal subdivision corners of sections pertinent to the subdivision boundary		
d.	All lots and blocks, designated by numbers, and the approximate dimensions and area of each lot		
e.	All streets, alleys, avenues, roads and highways, and the width of the right-of-way of each with existing and proposed street names, and proposed locations of intersections or other access points for any subdivision requiring access to arterial or collector highways		
f.	Physical access to the subdivision and each lot that meets the road standards set forth in the local regulations		
g.	Legal access providing vehicular travel from a city, county or state road to the subdivision, including adequate and appropriate easements, if necessary		
h.	The approximate location, boundaries, dimensions and areas of all parks, common grounds, and other grounds dedicated for public use		
i.	Any existing and proposed utilities located on and adjacent to the tract including:		
	(1) The approximate location, size and depth of sanitary and storm sewers		
	(2) The approximate location, size and depth of water mains and fire hydrants		
	(3) The approximate location of gas, electric and telephone lines, and street lights		
	(4) The approximate location of nearest water mains and sewer lines where none are located on or adjacent to the tract		

	Yes	No
j. Ground contours provided according to United States Geological Survey data or other information		
k. The approximate location of any existing buildings, structures and improvements		
l. The approximate location and identification of all existing easements and rights-of-way of record and proposed public and private easements and rights-of-way, including description of their width and purpose		
7. Preliminary plat supplements including:		
a. A vicinity sketch or sketches showing conditions on adjacent land including:		
(1) The names of adjoining platted subdivisions and numbers of adjoining certificates of survey previously recorded		
(2) The ownership of all lands adjacent to the subdivision and to any access road leading from a present public right-of-way to the boundary of the proposed subdivision		
(3) Any existing or proposed easement documents that would establish legal access		
(4) Location of any buildings, railroads, power lines, towers, roads and other nearby land uses		
(5) Any existing or proposed zoning		
b. A current U.S. Geological Survey topographic map, an aerial photograph, or a location map of the largest scale available, with an outline of the subdivision clearly indicated thereon		
c. When a tract of land is to be subdivided in phases, an overall development plan indicating the subdivider's intentions for the development of the remainder of the tract		

	Yes	No
d. Drafts of any covenants and restrictions to be included in deeds or contracts for sale		
e. If common property is to be deeded to a property owners' association, the subdivider filed a draft of the covenants and restrictions that will govern the association. These covenants and restrictions must at a minimum, provide that:		
(1) The property owners' association will be formed before any property is sold		
(2) Membership is mandatory for each property buyer and any subsequent buyer		
(3) The reservation of the common property will be perpetual		
(4) The association is responsible for liability insurance, local taxes, and the maintenance of recreational and other facilities		
(5) Property owners' must pay their pro rata share of the cost and the assessment charged by the association can become a lien on individual parcels		
(6) The association may adjust assessments to meet changing needs		
f. An environmental assessment of the proposed subdivision, when required		
g. Floodway survey data, when required		

PRELIMINARY PLAT FORM, CONTENTS AND SUPPLEMENTS

1. Preliminary Plat Form

A legible preliminary plat shall be submitted at a scale sufficient to minimize the number of sheets in order to maintain clarity and shall be on one or more sheets either 18 x 24 or 24 x 36 inches in size.

2. Preliminary Plat Contents

The preliminary plat submitted for approval shall show or contain on the face of the plat or on separate sheets referenced on the face of the plat the following information. A current topographic map, an aerial photograph or a location map of the largest scale available, with an outline of the subdivision clearly indicated thereon may be used to provide the information required below and in Preliminary Plat Supplements:

a. Name and location of the subdivision, scale, scale bar, north arrow, and date of preparation.

b. The approximate exterior boundaries of the tract and the approximate location of all section corners or legal subdivision corners of sections pertinent to the Subdivision boundary. If available, a metes and bounds or other legal description, or copy of previously recorded certificate of surveys or subdivision plats, would be submitted.

c. All lots and blocks, designated by numbers, and the dimensions and area of each lot.

d. All streets, alleys, avenues, roads and highways, and the width of the right-of-way, grades and curvature of each, existing and proposed street names, and proposed locations of intersections or other access points for any subdivision requiring access to arterial or collector highways.

e. The approximate location, boundaries, dimensions and areas of any parks, common grounds, or other grounds dedicated for public use.

f. Any existing and proposed utilities located on or adjacent to the tract including:
   1) The approximate location, size and depth of water mains, sanitary and storm sewers, and fire hydrants.
   2) The approximate location of nearest water mains and sewer lines where none are located on or adjacent to the tract.
   3) The approximate location of gas, electric and telephone lines, and street lights.

g. The approximate location of existing building, structures and improvements.

h. The approximate locations and identity of all existing easements and rights-of-way of record and proposed public and private easements and rights-of-ways, including descriptions of their width and purpose.

i. Ground contours shall be provided for a 200' x 200' area that includes the building site of any primary structure according to the following requirements:

Where average slope is	Contour intervals shall be
Under 10%	2 feet
10% or greater	5 feet

ii. Ground contours for the remainder of the parcel shall be 20 feet, (a 7 1/2 minute U.S.G.S. topographic map may be used if available).

3. Preliminary Plat Supplements

The following shall be supplied and considered part of the preliminary plat:

a. A vicinity sketch or sketches showing conditions on adjacent land including:
   1) The names of platted subdivisions and numbers of certificates of survey previously recorded.
   2) The ownership of lands adjacent to the exterior boundaries of the subdivision and to any access road leading from a present public right-of-way to the boundary of the proposed subdivision.
   3) Location of any buildings, railroads, power lines, towers, roads, and other land uses.
   4) Any existing or proposed zoning.
   5) Lands separated from the exterior boundary of the subdivision by public or private rights-of-way are deemed to be adjacent for the purpose of this requirement.

b. Lists of the names and addresses of owners of record of adjacent property.

c. Copies of easements or proposed easements to provide legal access to the subdivision.

d. When a tract of land is to be subdivided in phases, the subdivider must provide an overall development plan indicating intent for the development of the remainder of the tract.

e. Drafts of any covenants and restrictions to be included in deeds or contracts for sale.

f. If common property is to be deeded to a property owners' association, the subdivider shall submit a draft of the covenants and restrictions which will govern the association. These covenants and restrictions shall be in accordance with the requirements contained in Section II-C-5, Guaranty of Public Improvements.

g. A complete grading and drainage plan with accurate dimensions, courses and elevations, showing the proposed grades of streets and drainage improvements.

h. Drafts of public improvements agreement and guaranty.

i. An environmental assessment unless the subdivider has been exempted under the provisions of Section II–B–6. Appendix D provides the format of the assessment and questions to be addressed by the subdivider.

Final Plat Approval Application Form

Date_____

1. Name of Subdivision_____

2. Location: _____1/4 Section _____ Township _____Range_____ For Amended Plats: Lot(s)_____ Block(s) _____ _____Subdivision

3. Name, address and telephone number of subdivider:

   _____

   _____

4. Name, address and telephone number of persons of firms providing services and information (e.g. surveyor, engineer, designer, planning consultant, attorney):_____

   _____

   _____

5. Descriptive Data:

   a. Gross area in acres_____
   b. Number of lots or rental spaces_____
   c. Existing zoning or other regulations_____

      _____

6. Date Preliminary Plat Approved:_____

7. Any Conditions? _____ (If yes, attach list of conditions.)

8. Any Deed Restrictions or covenants?_____(If Yes, attach a copy.)

9. All improvements installed?_____ (If No, attach a subdivision improvements agreement or guarantees.)

10. List of materials submitted with this application:

    a._____ d._____
    b._____ e._____
    c._____ f._____

I do hereby affirm that all the statements and information and the statements and information contained in all exhibits transmitted herewith are true. I hereby apply to the (governing body) of (city or county) for approval of the final plat of (Name of Subdivision).

_____
Subdivider

FOR OFFICIAL USE ONLY

1. Application Number_____
2. Date Application Submitted_____
3. Date by which Final Plat must be approved or rejected_____

Certificate of Completion of Public Improvements Agreement
(To be submitted with application for approval of final subdivision plat)

CERTIFICATE OF COMPLETION

I, (Name of Subdivider), and I, (Name of Subdivider's Registered Engineer), a registered professional engineer licensed to practice in the State of Montana, hereby certify that the following public improvements, required as a condition of approval of (Name of Subdivision), have been installed in conformance with the attached engineering specifications and plans: (List the improvements actually installed.)

_____ _____
Signature of Subdivider Date

_____ _____
Signature of Professional Engineer Date

Registration No._____

_____(Engineers Seal)
Address

Certificate of Surveyor -- Final Plat

State of Montana)
) ss.
County of _____)

I, (Name of Surveyor), a registered Land Surveyor, do hereby certify that I have performed the survey shown on the attached plat of (Name of Subdivision); that such survey was made on (Date of Survey); that said survey is true and complete as shown and that the monuments found and set are of the character and occupy the positions shown thereon.

Dated this _____ day of _____, 19__.

(Seal)

(Signature of Surveyor)
Registration No. ____
(Address)

Certificate of Dedication -- Final Plat

(I) (We), the undersigned property owner(s), do hereby certify that (I) (We) have caused to be surveyed, subdivided and platted into lots, blocks, streets and alleys, as shown by the plat hereto annexed, the following described land in (City and County if in Unincorporated Area), to-wit:

(Exterior boundary description of area contained in plat and total acreage)

The above described tract of land is to be known and designated as (Name of Subdivision), and the lands included in all streets, avenues, alleys, and parks or public squares shown on said plat are hereby granted and donated to the use of the public forever.

Dated this _____ day of _____, 19__ .

(Acknowledged and notarized signatures of all record owners of platted property)

Consent to Dedication by Encumbrancers, If Any

(I) (We), the undersigned encumbrancer(s), do hereby join in and consent to the annexed plat and release (my) (our) respective liens, claims and encumbrances as to any portion of said lands shown on such plat as being dedicated to the use of the public forever.

Dated this _____ day of _____, 19__.

(Acknowledged and notarized signatures of all encumbrancers of record)

Certificate of Waiver of Park Land Dedication and Acceptance of Cash in Lieu Thereof

I, (Name of Municipal Clerk or County Clerk and Recorder) of (Name of City or County), Montana, do certify that the following order was made by the (Governing Body) of (Name of City or County) at a meeting thereof held on the _____ day of_____, 19__, and entered into the proceedings of said Body; to-wit: "Inasmuch as the dedication of park land within the platted area of (Name of Subdivision) is undesirable for the reasons set forth in the minutes of this meeting, it is hereby ordered by the (Name of Governing Body) that land dedication for park purposes be waived and that cash in lieu of park land be accepted under the provisions of 76-3-606, MCA."

In witness whereof, I have hereunto affixed the seal of (Name of City or County), Montana this _____ day of _____, 19__ .

(Seal) (Signature of Clerk)

Certificate Stating Facts Authorizing the Governing Body to Waive Park Dedication Under the Five Acre, Single Family Dwelling Exemption of the Montana Subdivision and Platting Act.

(Name of Subdivider), referred to herein as the subdivider, hereby certifies that all of the parcels within (Name of Subdivision) contain five acres or more and that the Subdivider will enter into a covenant to run with the land and revocable only by mutual consent of the owners of the parcels in question and the governing body of (Name of City or County), that the parcels in the subdivision will never be subdivided into parcels of less than five acres and that only one single-family dwelling and associated structures will be constructed on any single lot or parcel within the boundaries of the subdivision. A copy of this covenant is attached.

(Date) (Notarized Signature of Subdivider)

Declaration of Covenant

(To be filed with final plat where the five-acre, single family dwelling exemption applies)

THIS DECLARATION made on the date hereafter set forth, by (Name of Subdivider).

W I T N E S S E T H

THAT WHEREAS, Declarant is the owner of certain property known as (Name of Subdivision) in (City or County), State of Montana, which is more particularly described in attached Exhibit A.

NOW, THEREFORE, (Name of Subdivider) hereby declares that all of the properties described above shall be held, sold, and conveyed subject to the following covenant which shall run with the real property and be binding on all parties having any heirs, successors and assigns, and shall bind each owner thereof. The covenant may be revoked for any or all parcels within the subdivision by mutual consent of the owners of the parcels in question and the governing body of (City or County).

TO WIT:

No parcels within (Name of Subdivision) may be re-subdivided into parcels containing less than five acres and only single family dwellings and their associated outbuildings may be constructed within the boundaries of the subdivision, and only one such dwelling may be constructed on any present or future parcel or lot within the constructed subdivision. For the purpose of this restriction "single family dwelling" shall mean a building under one roof designed and intended for use and occupancy as a residence by a single family.

The governing body of (Name of City or County) is deemed to be a party to and may enforce its covenant.

IN WITNESS WHEREOF, the undersigned have hereunto set their hands this _____ day of _____, 19__.

(Signature of Subdivider)
Acknowledgement and notarization of Signature

Certificate of Examining Land Surveyor Where Required -- Final Plat

I, (Name of Examining Land Surveyor), acting as an Examining Land Surveyor for (City or County), Montana, do hereby certify that I have examined the final plat of (Name of Subdivision) and find that the survey data shown thereon meet the conditions set forth by or pursuant to Title 76, Chapter 3, Part 4, MCA.

Dated this ____ day of _____, 19__ .

(Signature)
(Name of Surveyor)
Registration No. ___
(City or County)

Certificate of County Treasurer

I hereby certify, pursuant to Section 76-3-611(1)(b), MCA, that no real property taxes assessed and levied on the land described below and encompassed by the proposed (Name of Subdivision) are delinquent:

(legal description of land)

Dated this ____ day of _____, 19__ .

(seal) (Signature of County Treasurer) Treasurer,
_____ County, Montana

Certificate of Final Plat Approval -- County

The County Commission of _____ County, Montana does hereby certify that it has examined this subdivision plat and having found the same to conform to law, approves it, and hereby accepts the dedication to public use of any and all lands shown on this plat as being dedicated to such use, this ____ day of _____, 19__ .

(Signatures of Commissioners) ATTEST:
(Signature of Clerk and Recorder)

(Seal of County) _____, Montana

Certificate of Final Plat Approval -- City

The (Commission) (Council) of the City (Town) of (Name of City or Town), Montana, does hereby certify that it has examined this subdivision plat and, having found the same to conform to law, approves it, and hereby accepts the dedication to public use of any and all lands shown on this plat as being dedicated to such use, this ____ day of _____, 19__ .

by (Signature of City or Town Clerk)
Clerk

(Signature of Mayor)
Mayor

Certificate of Filing by Clerk and Recorder

STATE OF MONTANA)
) ss.
County of _____)

Filed for record this _____ day of _____, 19__ , at _____ o'clock.

(Signature of Clerk and Recorder)
County Clerk and Recorder, _____ County, Montana

APPENDIX N

FISCAL IMPACT ANALYSIS

A. PURPOSES OF A FISCAL IMPACT ANALYSIS

1. General

A fiscal impact analysis of a development gives an overall picture of the comparison between added costs and added revenues generated by the development. A fiscal analysis allows the various local departments and districts to understand how the development will affect the financing services to the development. That understanding can greatly assist local officials in preparing annual budgets and long range plans.

A fiscal impact analysis only addresses the direct public costs and revenues associated with a development. It does not deal with secondary considerations such as loss of agricultural land or wildlife habitat, or growth in the private economic sector.

Fiscal analyses can be very detailed, or can be quite general, where "rules of thumb" are used to make cursory financial estimates. For subdivision review, reasonable, if imprecise, estimates of costs and revenues associated with a proposed subdivision will give an adequate overall fiscal picture. Departments of local government or local service districts may want to make more detailed fiscal assessments of their operations to help in preparing annual budgets, and in planning for long term needs and costs associated with capital outlays and changing needs in operating and maintenance costs.

2. Fiscal Analysis for Subdivision Review

A fiscal analysis of proposed subdivisions serves several specific purposes. First, the analysis is used in planning for expansion of local services or public facilities to serve a subdivision or subdivisions in a growth area. Governing officials, as well as department heads within the local jurisdiction, need to have some level of understanding of the costs and revenues involved in operating local government.

A second purpose is to inform local citizens and taxpayers how a new development will affect their taxes, both positively and negatively.

Another very important purpose of assessing the costs and revenues associated with a proposed subdivision is to help in weighing the review criterion "effects on local services."

A fiscal analysis includes two basic elements: estimating costs and estimating revenues. A fair assessment of costs is usually the more difficult of the two elements.

Local officials should not overemphasize a fiscal analysis in deciding whether to approve a subdivision. The expected financial picture is only one of many considerations that must be used in reviewing a subdivision.

A fiscal analysis is useful in planning for the provision of services or developing conditions that will minimize costs to the public.

B. PRINCIPLES OF FISCAL IMPACT ANALYSIS FOR SUBDIVISION REVIEW

1. Units of Local Government Affected

Every piece of property in Montana is located within at least three types of local taxing jurisdictions: a county, an elementary school district and a high school district. Each of these three jurisdictions provides services to, and levies property taxes on, all properties within its boundaries. In addition a parcel may be located within a municipality or a rural fire district, and would receive services from, and be taxed by, one of those jurisdictions.

A fiscal analysis of a proposed subdivision, therefore, should include estimated costs and revenues that the subdivision will generate for the county, elementary school district, and high school district. Where applicable, the costs and revenues created for a municipality or a rural fire district should be calculated.

Special improvement districts, rural improvement districts, county water and sewer districts, rural water associations and other special assessment districts or organizations are created to provide a particular service for the residents of the district. It is presumed that the costs created are equitably covered by the levied assessments or user fees, and that new development "pays its way." Thus, these special districts or organizations are not included in a fiscal impact analysis for a proposed subdivision.

2. Types of Methods Used in Cost Analysis

There are two basic approaches to assessing costs: average costing, and marginal costing.

Average costing methods allocate costs on a per capita or per unit basis, typically using the current average cost per unit as the basis for estimating the expected cost of future development. The average cost per unit is multiplied by the expected number of units associated with the development: persons, households, traffic volumes, school children, miles of road, or patients. The average cost per unit is assigned to a new development regardless of the availability of unused capacity for a service.

In marginal costing, the unused capacity of a facility or service is taken into consideration. For example, if a school has excess capacity in the form of unused space, or empty desks, the available desks and other equipment are not costs allocated to the subdivision unless the

number of students from a subdivision fills that available capacity, However, if a facility is near capacity, marginal costing would allocate the costs of expanding the capacity to the development.

Average costing is usually easier to calculate, but can significantly overstate or understate a development's costs over a short term. Marginal costing methods rely heavily on careful assessment of the relationship between current supply and projected demand, and can provide more accurate short term cost estimates.

It is important to understand that over the long run, both approaches will give similar projections of service costs, because disparities in existing capacity will balance out.

3. Cost Analysis for Subdivision Review

For conducting a fiscal impact analysis as part of subdivision review, average costing through use of the per capita (or per household) multiplier method is most appropriate for most local governments, and for most subdivisions.

First, assuming that a subdivision will exist for many years, any inaccuracies over the short term that average costing may create will be balanced out over the long term. Even for "big ticket" costs, such as capital facilities or costly equipment, calculating the average per household share of the costs will provide an equitable allocation for new subdivisions.

Second, the cost of local government services is related to the numbers of people using the services. While the link between service costs and population may be weak for certain services, or be affected by other factors in rural areas, population still is a significant factor, and per capita multipliers give a reasonable estimate of the costs.

Third, for subdivision review purposes, a ROUGH but reasonable estimate is sufficient. In fact, it is more thorough than most local governments now use.

Finally, per capita costing is the easiest method to use. Budget information is readily available for calculating local government expenditures on a per capita basis.

If a subdivision administrator or local government desires to use more precise or sophisticated costing methods, they can use some of the suggestions at the end of this Appendix.

C. METHOD FOR ESTIMATING COSTS OF A PROPOSED SUBDIVISION

For each local jurisdiction affected by a proposed subdivision, determining the expected costs to a local government from a proposed subdivision includes 3 steps:

1. Separating the residential share of current service costs from the non-residential share. Because the budgets for a municipality or a county include costs to serve both

residential and non-residential properties, some means must be found to separate out that portion of the budget that serves residential property.

2. Calculating the average per household costs of providing public services. The per household costs are directly proportional to per capita costs. Because subdivision lots represent households or dwelling units, working with per household costs relates directly to the readily quantified units of a subdivision -- lots.

3. Multiplying the per household costs by the expected number of lots (or dwelling units) in the proposed development.

1. Costs of County-wide Services

All county services except county roads are provided to all properties, both within municipalities and in the unincorporated area. The county levies its property tax, except for the mill levy for the road fund, on all properties within its boundaries. The mill levy for the road fund is levied only on properties in the unincorporated area.

a. Determining the Residential Portion of County-wide Services (including the area within incorporated cities and towns)

Using the percentage of improved (built upon) properties appears to be a reasonable approach to determining the residential share of county services. The underlying assumption in this approach is that improved parcels create the overwhelming need for county services, and that vacant parcels create little need.

Thus, all improved residential lots within the county will be separated from all the other improved properties - commercial, industrial, agricultural and mining.

The appraiser's records will show the number of residential lots with improvements as suburban tracts and city or town lots. The records also will show the number of commercial, industrial and mining parcels with improvements, and the number of agricultural properties with improvements (assume the improvements include an agricultural residence).

The residential share of county-wide services is determined by finding the percentage that all improved residential properties make up of the total number of improved properties:

$$\frac{\text{\# of Improved Residential Parcels in County}}{\text{\# of Total Improved Parcels in County}} = \text{Residential Share of County-wide Service Costs}$$

b. Calculating the Per Household Costs of County-wide Services

The total county-wide costs of county government are used to determine the per household costs (budget expenditures for the county road fund, rural improvement districts, and county water and sewer districts are not included).

The residential share of the total expenditures in the county-wide budget fund accounts is calculated by multiplying the residential share (from Step 1 above) by the total county-wide annual expenditures.

Total County-wide Budget Expenditures	x	Residential Share of County-wide Improved Parcels	=	Residential Share of County-wide Expenditures

The average per household cost of county-wide services is obtained by dividing the residential share of county-wide expenditures by the number of improved residential parcels (including those in municipalities).

$$\frac{\text{Residential Share of County-wide Expenditures}}{\text{\# of Improved Residential Parcels in county}} = \text{Per Household Cost of County-wide Services}$$

2. Costs of School Districts

For purposes of a fiscal analysis, the entire cost of elementary and high school education can be allocated to residential property, because school children are associated with residences. In each elementary and high school district the entire budget of the district can be allocated on a per household basis. In unincorporated areas, all households, whether rural residential or farm and ranch residences must be included in determining the per household costs.

The total budget of all the school district's accounts (general fund, transportation, debt and debt retirement, and special education) should be included, and divided by the total number of households in the district.

For elementary school districts:

$$\frac{\text{Elem. School District Budget}}{\text{Total Residential + Ag Households}} = \text{Per Household Costs of Elem. School District}$$

For high school districts:

$$\frac{\text{High School District Budget}}{\text{Total Residential + Ag Households}} = \text{Per Household Costs of High School District}$$

A cost analysis for any subdivision must involve the above calculations for those three jurisdictions (county-wide services, elementary school districts and high school districts). In addition, one of the following two cost analyses must also be calculated for each subdivision, depending whether it is located in a municipality or in the unincorporated area of a county.

3. Costs of Municipal Services

a. Determining the Residential Share of Municipal Costs

One approach is to assume that the share of total cost of municipal services to serve residential property is proportional to the residential share of the total market value of real property. The rationale is that municipal costs are greater to serve properties with higher land use intensities. For example, commercial properties and multiple- family residential properties require wider streets, more police and fire protection, and larger water and sewer mains. As land use intensity increases, the market value of the real property increases. Commercial properties typically have a higher market value than single family residential lots.

Therefore, under this reasoning, the residential proportion of total market value for real property is a reasonable indicator of the residential share of the total municipal costs.

Although everyone can think of exceptions where public service costs are not proportional to market value, over the entire municipal jurisdiction there likely is a balancing out that makes this rule of thumb reasonable. In the absence of a more detailed analysis of the public costs of serving residential development in an individual community, this means of separating out the residential share of total local government costs will serve as a simple and quick technique.

Market value of real property can be determined from the tax appraisal values shown in the county appraiser's records. First, with the county appraiser's help, determine the total appraised value of all improved residential properties (not vacant lots), and the total appraised value of all improved commercial and industrial properties.

$$\frac{\text{Total Appraised Value of all Residential Properties}}{\text{Total Appraised Value of all Properties}} = \text{Residential Share of Total Market (i.e., Appraised) Value in Municipality}$$

b. Calculating the Per Household Costs of Municipal Services

1) The total city-wide cost of services must be determined. The total costs of municipal services includes the expenditures shown in the annual budget in the general fund (or more commonly the all-purpose account), street and road fund, water, sewer and solid waste funds, and the annual amortization cost of outstanding municipal bonds.

It is important that the expenditures of special improvement districts and maintenance districts (which serve only parts of the city) are not included in the total costs.

2) The total municipality-wide expenditures must be multiplied by the residential share of the total market value (determined 1 above) to obtain the residential share of the total cost of municipal services.

Total Municipal Budgeted Costs	x	Residential Share of Total Market Value in Municipality	=	Residential Share of Municipal Costs

3) The residential share of municipal costs is divided by the number of households served by the municipality to determine the average per household cost of city services.

The number of households within a municipality can be obtained from the appraiser's records of improved residential lots within the city limits.

$$\frac{\text{Residential Share of Municipal Costs}}{\text{\# Households in Municipality}} = \text{Per Household Costs of Municipal Services}$$

3. Costs of County Road Services

For subdivisions located outside of municipalities, the costs of county road services must be determined. County road services are provided only to residents and properties in the unincorporated area of the county. The method of determining per household cost of county road services is similar to that of determining county-wide services, except that only properties in the unincorporated area are used.

a. Determining the Residential Share of County Road Costs

The residential share of the cost of road services is determined by first finding the percentage that improved residential parcels in the unincorporated area make up of the total improved properties in the unincorporated area.

$$\frac{\text{\# of Improved Residential Parcels in Unincorporated Area of County}}{\text{\# of Total Improved Parcels in Unincorporated Area of County}} = \text{Residential Share of Improved Parcels in Unincorporated Area}$$

Second, the unincorporated residential share (from above) is multiplied by the budget expenditures in the Road Fund.

$$\text{Total Road Fund Budget Expenditures} \times \text{Residential Share of Improved Parcels in Unincorporated Area} = \text{Residential Share of Road Costs}$$

To calculate the average per household cost of county road services the residential share of the county road fund is divided by the number of unincorporated residential households to give the per household cost of county road services.

$$\frac{\text{Residential Share of Road Costs}}{\text{\# of Improved Residential Parcels in Unincorporated Area of County}} = \text{Per Household Cost of County Road Services}$$

4. Costs of Rural Fire Districts

Whenever a proposed subdivision is located within a rural fire district the added costs to the fire district can be estimated.

The rural fire chief of each district usually can give the subdivision administrator an idea of what a proposed subdivision would mean to the expenditures of the district. He may simply separate the residential costs on the basis of the proportion of residential parcels in the district. From his records he may be able to estimate how a residential subdivision will affect the district's budget.

Where a more specific method is not available, the costs created by a subdivision for a fire district can be estimated in the same manner as for county costs: the residential share of the total costs are assumed to be the percentage of improved residential properties, and the per household costs are determined by dividing the residential share of the fire district costs by the number of improved residential parcels in the district.

$$\frac{\text{\# of Improved Residential Parcels in Fire District}}{\text{\# of Total Improved Parcels in Fire District}} = \text{Residential Share of Fire District Costs}$$

$$\frac{\text{Residential Share of Fire District Costs}}{\text{\# of Improved Residential Parcels in Fire District}} = \text{Per Household Cost of Fire District}$$

D. DETERMINING THE EXPECTED TOTAL COSTS CREATED BY A PROPOSED SUBDIVISION

The total costs created by a new subdivision is determined by calculating the costs for each local jurisdiction affected by the subdivision. The costs for each jurisdiction is determined by multiplying the per household costs for the jurisdiction by the number of new households or lots in the subdivision.

1. Subdivisions in Municipalities

Municipal residents receive services from 4 jurisdictions: the county, elementary school district, high school district, and the municipality. The expected number of new

households or lots is multiplied by the total of: the per household cost for municipal services + per household cost for county-wide services + per household elementary school costs + per household high school costs:

Per H'hold Muni. Cost	+	Per H'hold County Cost	+	Per H'hold E.Sch. Cost	+	Per H'hold H.Sch. Cost	=	Total Per H'hold Costs

Total Per H'hold Costs	x	# of Lots (or Dwelling Units) in Proposed Subdivision	=	Total Cost of Services for Proposed Subdivision

2. Subdivisions in Unincorporated Areas

Residents in unincorporated areas receive services of 4 types: county-wide, county road, elementary school district, and high school. Residents in some unincorporated areas also receive rural fire district services or county water or sewer district services.

The expected number of new households or lots in the subdivision is multiplied by the total of: per household costs for county-wide services + per household costs of county road costs + per household elementary school costs + per household high school costs (+ per household costs of rural fire district, if applicable).

Per H'hold Co. Road Cost	+Per H'hold County Cost	+ Per H'hold E.Sch. Cost	+ Per H'hold H.Sch. Cost	+ (if applic) Per H'hold R.Fire Cost	+ (if applicable) Per H'hold Water/Sewer Cost

= Total Per H'hold Costs

Total Per H'hold Costs	x	# of Lots (or Dwelling Units) in Proposed Subdivision	=	Total Cost of Services for Proposed Subdivision

E. ESTIMATING REVENUES FROM A PROPOSED SUBDIVISION

Land developments generate revenues for local government primarily through property taxes, and also through user charges and transfers from state or federal agencies (to the extent that a subdivision may represent a net increase in the jurisdiction's population, the added population can result in greater fund transfers from the state and federal government, such as Federal Revenue Sharing, state liquor revenues).

1. Property Taxes

Property taxes are assessed on real property based on the value of the property. The county appraiser, using appraisal procedures specified by the Department of Revenue, determines the appraised (or market value) of each property. The appraised value of residential property is multiplied by .0386 (the tax rate for residential property) to give the taxable value. For example, a house and lot that has a market value of $70,000 would have a taxable value of $70,000 x .0386 = $2,702. The $2,702 taxable value is multiplied by the number of mills assessed by each local jurisdiction (county, municipality, school districts, fire districts) to generate the amount of property tax revenues. A mill is 1/1000 of a dollar, so each mill levied on the house and lot generate $2.70 ($2,702 x .001 = $2.70). For example, under a county mill of 65 mills the house and lot would yield $173.63 in county property taxes ($2,702 x .065 = $173.63).

The subdivision administrator can ask the subdivider and check with real estate agencies to determine the types and value of homes to expect on the proposed subdivision lots. After determining the anticipated average market value of a completed house and lot, the subdivision administrator multiplies market value by 50 percent (or a more specific percentage recommended by the county appraiser to represent the difference between the market value and the tax appraisal value in the particular county). The tax appraisal value is multiplied by .0855 to obtain the taxable value, which is multiplied by the number of lots to find the taxable valuation of the entire subdivision.

The result is multiplied by the number of mills levied by each local jurisdiction (e.g., county, elementary school district, high school district, and the municipality and fire district, if applicable).

The process in summary (for a proposed subdivision of 26 lots):

Market value	x	Tax rate	x	Number of lots	x	Number* of mills	=	Property Tax revenues
$70,000	x	.0386	x	26	x	65**	=	$4,566.38

* Use the current mill levy; ** 65 mills equals .065 (65 x .001 = .065)

The subdivision administrator must determine the likelihood that lots in the proposed subdivision will have homes built. It may be many years before houses are built on the lots and thus the tax revenues will be generated only by the lots, not by the improvements. The subdivision administrator may want to give the planning board and local officials an estimated time period for the subdivision lots to be developed, and what tax revenues will be generated over a period of years.

2. Intergovernmental Transfers

a. Counties and Municipalities

For counties and municipalities most automatic funding sources from the state or federal government are allocated on a population formula, or on factors that have some relationship to population. The amounts of transfer funds shown on the municipal or county budget can be divided by the number of current households and the resulting per household figure multiplied by the number of expected lots in the proposed subdivision.

b. Schools

For schools, transfers from the state school equalization Program provide state funding for each school district. The state of Montana is experiencing considerable controversy regarding equitable funding for education, and as a result the formulas for providing state aid to elementary and high school districts are changed frequently in the Legislature.

A subdivision administrator should contact the superintendent of each affected school district to obtain an estimate of the per student funding that is allocated by the state on Montana.

The additional funding from the state school equalization program that would be generated by the proposed subdivision can be determined by finding the average state funding per student in the district and multiplying that figure by the number of new students expected from the subdivision. School officials may be able to estimate the average number of school-age children per new household. In the absence of local data, the subdivision administrator can assume 1.5 dependent children per household, 53 percent of elementary school age, 22 percent high school age, and 25 percent pre-school age. Each household would average .8 elementary students and .33 high school students.

# H'holds in Proposed Subdivision	x	.8	=	# new Elementary Students
# H'holds in Proposed Subdivision	x	.33	=	# new High School Students

$$\frac{\text{State School Funding}}{\text{Current \# of Students}} \times \text{\# of new Students} = \text{Increase in School Foundation Funds}$$

SUMMARY OF FISCAL IMPACT ANALYSIS OF A SUBDIVISION IN A MUNICIPALITY

COSTS

MUNICIPAL SERVICES

1. Residential Share of Municipal Costs = Total Municipal Costs (in budget) x Residen % of Total Market Value in Municipality

2. Per Household Costs of Municipal Services = Residential Share of Municipal Costs / # Households in Municipality

3. Total Municipal Costs of Subdivision = Per Household Costs of Municipal Services x # Lots (or Dwelling Units) in Subdivision

COUNTY-WIDE SERVICES

1. Residential Share of County Service Costs = # of Improved Resident Parcels in County / # of Total Improved Parcels in County

2. Per Household Costs of County Services = Residential Share of County Costs / Total # Improved Residential parcels in County

3. Total County Costs of Subdivision = Per Household Costs of County Services x # Lots(or Dwell Units) in Subdiv

ELEMENTARY SCHOOL DISTRICT

1. Per Household Costs of Elementary School = Total Elementary School District Budget / Total Residential + Agricultural Households

2. Total Elem. School Costs of Subdiv. = Per Households Costs of Elem. School District x # Lots (or Dwell Units) in Subdiv

HIGH SCHOOL DISTRICT

1. Per Household Costs of High School = Total High School District Budget / Total Residential + Agri Households

2. Total High School Costs of Subdiv. = Per Households Costs of High School District x # Lots (or Dwell Units) in Subdiv.

REVENUES

1. Appraised Value of Subdivision = Market Value of Total # Houses, Lots and Improvements

2. Taxable Valuation of Subdivision = .0386 x Appraised Value of Subdiv

3. Municipal Property Tax Revenues = Total Municipal Mill Levy x Taxable Value of Subdivision

1. Appraised Value of Subdivision = Market Value of Total # Houses, Lots and Improvements

2. Taxable Valuation of Subdivision = .0386 x Appraised Value of Subdiv

3. County Property Tax Revenues = Total County-wide Mill Levy x Taxable Value of Subdivision

1. Per Household Revenues from School Foundation Program = Total State School Funds Received / Total Resid and Agri H' holds in Elem. District

2. Total School Foundation Revenues Generated by Subdivision = Per Household Revenues from State School Program x Total # Lots (or Dwelling Units) in Subdivision

3. Elem. District Tax Revenues = Total Elem. District Mill Levy x Taxable Valuation of Subdivision

4. Total Elem. Dist. Revenues Generated by Subdivision = Total School Foundation Revenues Generated + Elem. District Tax Revenues

1. Per Household Revenues from State School Program = Total State School Funds Received / Total Residential and Agricultural Households in High School District

2. Total School Foundation Revenues Generated by Subdivision = Per Household Revenues from State School Program x Total # Lots (or D U.'s) in Subdiv

3. H. S. District Tax Revenues = Total H. S. District Mill Levy x Taxable Valuation of Subdivision

4. Total H.S Dist. Revenues Generated by Subdivision = Total State School Revenues Generated + Elem. District Tax Revenues

APPENDIX O

PREPARATION OF A SUCCESSFUL LAND USE CASE FOR REGULATORY VIOLATIONS

Prepared by Jean E. Wilcox
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Missoula County Montana
Montana Association of Planners Conference
November, 1984

I. PROCEDURE FOR FORMULATING A CASE

A. COMPLAINT

1. Interview and record information given by complainant

   a. Complainant's name, address, availability as a witness, names of other witnesses.

   b. Nature of complaint (e.g. land use activity)

   c. Names and addresses of land owner and/or occupier.

   d. Dates, times of activity occurrence.

2. Verify information

   a. visit general area

   b. check ownership and other public record

3. Determine if there appears to be a violation.

B. INVESTIGATION

1. Contact alleged violator

2. Visit site with owner's permission (see Trespass below)

   a. notes

   b. photographs (see also Preservation of evidence, below)

3. As for voluntary compliance by letter

   a. defense of M.C.A. 45-2-103(4) (see Criminal or Civil Remedy, below)

      "A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(a) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him.

b. Use certified mail return receipt requested

c. Give a deadline for compliance

4. Interview witnesses

5. Compile all relevant information from public record

C. EVALUATION

1. Determine elements of violation (see Basic Elements, below)

2. Determine legal issues

3. Organize evidence - is there evidence to prove each element of a violation?

D. WRITTEN REPORT

1. Citation of regulation violated

2. Description of activity in violation

3. Name and address of property owner and/or occupant of land

4. Record of observations of site, correspondence and/or conversations with landowner or occupant including dates, names, addresses

5. Photographs (see Preservation of Evidence, below)

6. Record of interviews with other witnesses, names and addresses

7. Compilation of information from public record and other agencies

II. BASIC ELEMENTS OF COMMON REGULATORY VIOLATIONS (assumes local regulations are based on state models)

A. ZONING

1. Case 1: Prohibited Activity

   a. Defendant occupies or owns certain property (describe)

   b. Property lies in certain zone (describe)

   c. Zone prohibits certain uses (cite Section of ordinance)

   d. Defendant is conducting a certain land use activity (describe)

   e. Defendant's land use activity falls within the prohibited uses

2. Case 2: Noncompliance with standards

   a. Defendant occupies or owns certain property (describe)

   b. Property lies in certain zone

   c. Defendant obtained a permit (describe) for certain activity (describe) on (date)

   d. Permit requirements or zone standards (cite section of ordinance)

   e. Defendant failed to comply with standards (describe how)

B. SUBDIVISION

1. Case 1: Condition of Plat Approval

   a. Developer (name) obtained conditional plat approoval from local governing body (name) on (date)

   b. Conditions of plat approval

   c. Developer failed to comply

2. Case 2: Evasion

   Note: There is a wide divergence of opinion on what constitutes an evasion of the subdivision law

   a. Subdivider's name, address

   b. Landowner's name and address (if different from above)

c. Divisions of land, exemptions used, dates of filing of surveys (pattern of divisions)

d. Transfers of possession or title (pattern of transactions)

e. Existence of other indications of a common subdivision development (e.g. covenants; common sewer, water, or road systems; common realtor, surveyor, or engineer for divisions and sales purportedly made by different individuals (or close relationsip between agents and subdividers); representation to the public as a single development).

III. CONSIDERATIONS

A. CRIMINAL OR CIVIL REMEDY

1. Availability of choice

a. Zoning

(1) Enacted under M.C.A. 76-2-101 et seq., civil only. See 30 AG. Op. 19 (1963)

(2) Enacted under M.C.A. 76-2-201 et seq. either criminal misdemeanor (M.C.A. 76-2-211) or civil (M.C.A. 7-5-2104)

(3) Enacted under M.C.A. 76-2-301 et seq. criminal misdemeanor (M.C.A. 7-5-4207, M.C.A. 76-2-315), civil penalties authorized (M.C.A. 76-2-315)

b. Subdivision

(1) Condition of plat approval: Criminal misdemeanor (M.C.A. 76-3-105) if violates a local regulation. County may also bring a civil suit under M.C.A. 7-5-2104.

(2) Evasion: Criminal misdemeanor (M.C.A. 76-3-105). Each sale, lease, or transfer of each separate parcel of land in violation of any provision of the subdivision act or local regulations is a separate and distinct offense.

c. Floodplain

(1) DNR administered: Criminal misdemeanor (76-5-110). Each day's continuance of a

violation shall be deemed a separate and distinct offense.

(2) Locally administered: Criminal misdemeanor (76-5-110) or civil (M.C.A. 7-5-2104).

2. Investigations and Evidence

a. Criminal -- (See also Warrantless Searches, below)

(1) Constitutional protections of the 4th Amendment to the U.S. Constitution apply Camara v. Municpal Court of the City and County of San Francisco, 3087 U.S. 523 (1967)
But see, Frates v. City of Great Falls, Memorandum Opinion No. CV 81-117-6F, Montana District, Great Falls Division, June 30, 1983, 40 St. Rep. 1307.

(2) Violations of the 4th Amendment can result in inadmissable evidence

b. Civil --

(1) 4th Amendment protection does not apply, although investigator cannot violate privacy or trespass

(2) Authenticity of evidence is key

(3) Discovery available

3. Burden of proof

a. Criminal: Beyond a reasonable doubt

b. Civil: By a preponderance of the evidence

4. Choice of forum

a. Criminal misdemeanor: Justice Court

b. Civil complaint: District Court

5. Appeal

a. Criminal: no appeal if state loses

b. Civil: appeable to Montana Supreme Court

6. Penalty

a. Misdemeanor: up to $500 fine and/or 6 months in county jail (except where specified differently)

b. Civil: compliance, costs

B. INVESTIGATIVE TOOLS

1. INVESTIGATIVE SUBPOENAS

a. Available from the court through the county attorney or attorney general for investigating an alleged unlawful activity which they would otherwise have a duty to enforce (M.C.A. 46-4-301). Commands a person to appear to give testimony and/or produce books, records, papers, documents, and other objects necessary to an investigation, subject to the restriction against self-incrimination.

b Available through the county commissioners under M.C.A. 7-5-2127 "to compel attendance of any person and the production of any books or papers relating to the affairs of the county, for the purpose of examination upon any matter within its jurisdiction.

2. Searches and Seizures

a. Can only be made when:

(1) incident to a lawful arrest

(2) with the consent of the accused or any other person who is lawfully in possession of the object or place to be searched

(3) under the authority of a valid search warrant

(4) under the authority and within the scope of a right of lawful inspection granted by law (e.g. where permit, once given, allows the public official to make routine inspections) M.C.A. 46-5-101

b. Search warrants (investigations leading to criminal violations)

(1) must be delivered by a peace officer and issued by a judge or justice of the

peace

(2) must particularly describe the place to be searched and evidence to be obtained

(3) must be preceded by an affidavit stating the facts, showing probable cause.

If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant for an administrative inspection. Camara v. Municpal Court of the City and County of San Francisco, 387 U.S. 523, 538 (1967).

c. Warrantless Searches v. Trespassing

(1) Warrantless Searches: criminal terminology

(a) Fourth Am., U.S. Const.: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

(b) Under early federal cases, Fourth Amendment protections generally do not apply to routine administrative inspections not made as a result of a complaint (e.g. restaurant inspections).

See, e.g. Frank v. Maryland, 359 U.S. 360 (1959) in which the U.S. Supreme Court held that civil inspections without a warrant as an adjunct to a regulatory scheme for the general welfare and not as a means of enforcing criminal law are not a violation of constitutional rights, provided the inspection is reasonable and accompanied by certain minimum safeguards.

(c) More recent federal cases have applied Fourth Amendment

protections to administrative inspections

(i) See e.g. Camara, 387 U.S. 523 (1967). And, Marshall v. Barlow{s Inc., 98 S. Ct. 1816 (1978) (U.S. Supreme Court invalidated a provision in OSHA which allowed warrantless spotcheck searches, but a search warrant can be obtained upon a showing of a valid public interest).

(ii) But see, Frates v. City of Great Falls, Memorandum Opinion No. CV 81-11-GF, Montana District, Great Falls Division, June 30, 1983, 40 St. Rep. 1307. Frates alleged that the entry onto his property for the purpose of terminating water service by city employees violated the Fourth Amendment. The court disagreed, stating that the Fourth Amendment only affords protection against unreasonable governmental searches. Here the entry was not a "search" because it was not made for the purpose of obtaining evidence for prosecuting a criminal action. A simple trespass does not become a search merely because the offender is a government employee. Furthermore, the entry was reasonable in that the employees entered Frate's commercial property openly at an unfenced location next to a parking lot.

(iii) cases where search warrants are clearly not required, even under recent cases involve emergencies, seizure of contaminated food, health quarantines, or destruction of tubercular cattle (See Camara, 387 U.S. 523 (1967)).

(d) Warrantless searches should not be used to gather evidence of a crime because of the possibility of violating the Fourth Amendment. Easier to obtain a warrant first.

(e) "Open Fields Exception": An investigator can observe without a

warrant anything which would be similarly observed by the general public, from either on or off the property. These observations can be used as evidence.

(2) Trespassing: civil terminology

(a) Definition
A person commits the offense of criminal trespass to property if he knowingly enters or remains unlawfully in an occupied structure or in or upon the premises of another (when he is not licensed, invited, or otherwise privileged to do so). M.C.A. 45-6-203. You are considered to be privileged unless notice is personally communicated to you by an authorized person or is conspicuously posted.

(b) Unlikely that you will be guilty of trespass unless you refuse to leave after being told or signs are posted, but to preserve the use of your observations as evidence, ask permission first.

C. CONFIDENTIALITY

1. Criminal action

a. Disclosing criminal investigative information is prohibited by the Montana Criminal Justice Information Act of 1979 (M.C.A. Title 44, Ch. 5)

b. The defendant has the right to see the evidence being used against him/her once an action is filed (but see M.R.C.P. 502)

c. Court records and proceedings are not confidential. M.C.A. 44-5-103(12)

2. Civil action -- public agency considerations

a. Public "right to know": Montana Constitution, Art. II Sec. 9

1. Public records must be available for inspection and copying. M.C.A. Title 2, Ch. 6

2. Exception to Art. II, Sec. 9: "except

in cases in which the demand of the individual privacy clearly exceeds the merits of public disclosure."

3. Statutory exceptions requiring confidentiality for adoption records, Youth Court proceedings, etc. (generally not applicable to land use regulations) See annotations to Art. II, Sec. 9 Mont. Const.

b. Individual Right to Privacy: Montana Constitution, Art. II, Sec. 10

1. Avoid disclosing information about the violator

2. Individual in violation has a right to inspect government files pertaining to him/her.

3. Can refuse to disclose the identity of an informer. Rule 502 Montana Rules of Evidence, (M.C.A. Title 26, Ch. 10).

D. PRESERVATION OF EVIDENCE
General Rule: Evidence used in a trial must be authenticated

1. Office files -- correspondence, forms.

2. Observations -- must be either

a. Recorded immediately after observation (Rule 803(1))

b. Not offered as an exhibit but a writing used to refresh your memory during testimony at trial (Rule 612, M.R. Evid.)

(Note: be prepared to give up all your notes!)

c. Recorded recollection - where current memory not sufficient - Rule 803(5)

(Note: Can be read into evidence but cannot be used as an exhibit)

d. Record of a regularly conducted activity (e.g. a routine inspection) Rule 803(6))

3. Photographs -

a. Record date, time, type of camera, type of film, photographer processor

b. Record of chain of possession

c. If you are the photographer, be prepared to testify that the photgraph accurately depicts what it purports to show.

4. Maps

a. Generally for illustrative purposes only

b. Scale, north arrow, general reference points (e.g. major streets and roads) are important

c. Knowledge of witness that the map is what it claims to be

APPENDIX P

DEFINITIONS

ADJOINING (ADJACENT) PROPERTY OWNER: the owner of record of a parcel of land that is contiguous, at any point, to the parcel, or land that is separated from the parcel by a common road.

APPROVAL: the official action taken by the governing body with regard to a proposed subdivision, plat or dedication.

BLOCK: a tract of land entirely surrounded by public streets, highways, waterways, railroad rights–of–way, parks, or other tracts of land.

BUILDING: a structure constructed for support, shelter, or enclosure of any kind.

CERTIFICATE OF SURVEY: a drawing of a field survey prepared by a registered land surveyor for the purpose of disclosing facts pertaining to boundary locations.

CLUSTERING: a design concept in which the property owner concentrates development on one or several portions of land, leaving the remainder in open or undeveloped space.

COMPREHENSIVE OR MASTER PLAN: a development plan or any of its parts relating to land use, transportation, sanitation, recreation, public facilities or related matters, as defined in Section 76–1–103, MCA.

CONDOMINIUM: a form of individual ownership with unrestricted right of disposal of one or more units in a multiple unit project with the land and all other parts of the project held in common ownership or use with owners of the other units.

COVENANT: an agreement, in writing, of two or more parties by which any of the parties pledges to the others that something is done or shall be done.

DEDICATION: the deliberate appropriation of land or a facility by an owner for any general or public use, reserving no rights that are incompatible with the full exercise and enjoyment of the public use to which the property has been devoted.

DENSITY: the number of lots or dwelling units within a given geographic area (e.g., 4 dwelling units per acre).

DIVISION OF LAND: the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring, or contracting to transfer, title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to the Montana

Subdivision and Platting Act. Provided that where required by the Act the land upon which an improvement is situated has been subdivided in compliance with the Act, the sale, rent, lease or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land and is not subject to the terms of the Act.

DWELLING UNIT: any building or portion thereof providing complete, independent and permanent living facilities for one family.

EASEMENT: a recorded right granted by the property owner to another person, public utility or government entity or the general public to use a portion of the land for a specified purpose.

ENGINEER (REGISTERED PROFESSIONAL ENGINEER): a person licensed in accordance with the Montana Professional Engineers' Registration Act (Title 37, Chapter 67, MCA) to practice engineering in the State of Montana.

EVASION OF THE MONTANA SUBDIVISION AND PLATTING ACT: a use of the statutory exemptions from subdivision approval which, in the judgement of the local governing body, is not consistent with the legislative intent of the Act, or which creates a de facto subdivision without local government approval.

EXAMINING LAND SURVEYOR: a registered land surveyor duly appointed by the governing body to review surveys and plats submitted for filing.

FAMILY TRANSFER (CONVEYANCE) EXEMPTION: an exemption from local subdivision review and approval for divisions of land where one parcel in each county may be sold or given to each member of the landowner's immediate family.

FLOOD: the water of any watercourse or drainageway that is above the bank or outside the channel and banks of such watercourse or drainageway.

FLOOD OF 100-YEAR FREQUENCY: a flood magnitude expected to recur on the average of once every 100 years, or a flood magnitude that has a one percent chance of occurring in any given year.

FLOODPLAIN: the area adjoining the watercourse of drainageway that would be covered by the floodwaters of a flood of 100 year frequency.

FLOODWAY: the channel of a watercourse or drainageway and those portions of the floodplain adjoining the channel which are reasonably required to carry and discharge the floodwater of any watercourse or drainageway.

GOVERNING BODY: the elected county commissioners of a county or the city council or commissioners of a municipality.

IMMEDIATE FAMILY (MEMBERS OF): a person's spouse, or children and parents by blood or adoption.

IMPROVEMENT (PUBLIC): any publicly owned or controlled structure or facility constructed to serve the residents of a subdivision or the general public such as parks, streets and roads, sidewalks, curbs, gutters, drainage swales, street lighting, utilities, and systems for water supply and treatment and sewage disposal.

IMPROVEMENTS AGREEMENT: a contractual arrangement that may be required by the governing body to ensure the construction of such improvements as are required by local subdivision regulations. These may include collateral such as irrevocable letters of credit, performance or property bonds, private or public escrow agreements, deposit of certified funds, or other similar financial guarantees.

LOT: a parcel or other land area created by subdivision for sale, rent or lease.

LOT MEASUREMENTS:

a. Lot Depth: the length of a line drawn perpendicularly to the front lot line and extending to the rear lot line.
b. Lot Width: the average width of a lot.
c. Lot Frontage: the width of the lot along the front lot line.
d. Lot Area: the area of a lot determined exclusive of street, highway, alley, road, or other rights-of-way.

LOT TYPES:

a. Corner Lot: a lot located at the intersection of two streets.
b. Interior Lots: a lot with frontage on only one street.
c. Through or Double-Frontage Lot: a lot whose front and rear lines both abut on streets.

MINOR SUBDIVISION: a subdivision containing five or fewer parcels where proper access to all lots is provided, and where no land within the subdivision will be dedicated to public use for parks or playgrounds.

MOBILE HOME: a factory-assembled structure equipped with the necessary service connections and made so as to be readily movable as a unit or units on its own running gear and designed to be used as a dwelling unit without a permanent foundation.

MOBILE HOME LOT: a designated portion of a mobile home park designed for the accommodation of one mobile home and its accessory buildings or structures for the exclusive use of the occupants.

MOBILE HOME PARK: a tract of land providing two or more mobile home lots for lease or rent to the general public.

MOBILE HOME STAND (PAD): that area of a mobile home lot that has been prepared for placement of a mobile home.

MODULAR STRUCTURE: a residential, commercial or industrial building or other structure that is manufactured or built at one site and delivered to, and placed on, another site.

MONUMENT (SURVEY): a marker or object of metal, masonry or other permanent material placed in the ground, which is exclusively identifiable as a monument to a survey point, and expressly placed for surveying reference.

OPEN SPACE: an undeveloped land or water area devoid of buildings except where accessory to the provision of recreation.

OVERALL DEVELOPMENT PLAN: the plan of a subdivision design for a single tract proposed to be subdivided in stages.

PLANNED UNIT DEVELOPMENT (PUD): a land development project consisting of residential, commercial, office, or industrial areas, or any combination thereof that comprises a planned mixture of land uses built in a prearranged relationship to each other and having open space and community facilities in a common ownership or use.

PLANNING BOARD: a citizen board established by the local governing body under Title 76, Chapter 1, MCA, for advising and carrying out the statutory responsibilities for local government planning within the jurisdiction.

PLAT (SUBDIVISION PLAT): a graphic representation of a subdivision showing the division of land into lots, parcels, blocks, streets and alleys, and other divisions and dedications.

a. Preliminary Plat: a neat and scaled drawing of a proposed subdivision showing the layout of streets, alleys, lots, blocks and other elements of a subdivision which furnish a basis for review by local officials.
b. Final Plat: the final drawing of the subdivision and dedications required to be submitted for filing with the county clerk and recorder containing all elements and requirements set forth in the Uniform Standards for Final Subdivision Plats (ARM 8.94.3003) and local regulations.
c. Amended Plat: the final drawing of any change to a platted subdivision filed with the county clerk and recorder required to be prepared for filing for record with the county clerk and recorder and containing all elements and meeting requirements set forth in the Uniform Standards for Final Subdivision Plats and local regulations.

PREAPPLICATION SKETCH: a legible drawing showing approximate boundaries, dimensions, areas, distances and other pertinent information of a proposed subdivision.

PROPERTY OWNER: any person, firm, corporation or other entity shown in the records of the county clerk and recorder as holding legal title to a tract or parcel of land, or to improvements on land.

PROPERTY (HOMEOWNERS') ASSOCIATION: an organization recognized by the governing body, formed under the laws of the State of Montana, and operating under recorded land agreements through which each property owner is a member.

RECREATIONAL VEHICLE PARK: an area used for public camping where persons can rent space to park individual camping trailers, pick–up campers, motor homes, travel trailers, or automobiles for transient dwelling purposes.

RIGHT–OF–WAY: a corridor of land dedicated or acquired for use by the public or a private entity.

ROADWAY: that portion of a road or street right–of–way that is improved, or is proposed for improvement, to carry traffic and may provide for on–street parking of vehicles.

SUBDIVIDER: any person, firm or corporation, or other entity who causes land to be subdivided or who proposes a subdivision of land.

SUBDIVISION: a division of land or land so divided which creates one or more parcels containing less than 160 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented or leased, or otherwise conveyed, and shall include any resubdivision; and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles or mobile homes. A subdivision shall comprise only those parcels less than 160 acres which have been segregated from the original tract, and the plat thereof shall show all such parcels whether contiguous or not. Provided, however, condominiums constructed on land divided in compliance with the Montana Subdivision and Platting Act are exempt from the provisions of the Act.

SURVEYOR (REGISTERED LAND SURVEYOR): a person licensed in conformance with the Montana Professional Engineer's Registration Act (Title 37, Chapter 67, MCA) to practice land surveying in Montana.

SWALE: a drainage channel or shallow depression designed to direct surface water flow.

TOWNHOUSE: a dwelling unit within a multiple family structure connected to but separated by a common wall, and in which the owner holds title to the unit and to the land beneath the unit, as well as holding joint title to common land area and facilities within the development.

TRACT: a parcel of land held in single and undivided ownership as indicated by the records on file in the county clerk and recorder office.

TRACT OF RECORD: a parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office.

UTILITIES: the facilities and systems for delivering community services including, but not limited to, water, sewerage, gas, electricity, telephone, cable television, solid waste. The facilities and systems may be publicly or privately owned.

VICINITY SKETCH (LOCATION MAP): a map showing the general location of a proposed subdivision with respect to adjacent properties, streets or major landmarks within the area.